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IN THE
Supreme Court of the United States
October Term, 1984

MONON SHIPPERS ASSOCIATION, INC., *et al.*,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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June, 1985

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QUESTIONS PRESENTED*

1. Whether the Congress intended any changes in the substantive standards governing line abandonment applications in Staggers Rail Act of 1980.

2. Whether the proper standard to govern issuance of an interlocutory in judicial review of I.C.C. line abandonment decisions is whether the agency decision is "wrong."

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*Petitioners in the Court of Appeals are Monon Shippers Association, Inc., Jack O. Black, and Office of Utility Consumer Counselor for the State of Indiana. Respondents are Interstate Commerce Commission and United States of America. Intervening respondent is Seaboard System Railroad, Inc.

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IN THE

Supreme Court of the United States

October Term, 1984

MONON SHIPPERS ASSOCIATION, INC., *et al.*,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Monon Shippers Association, Inc., Jack O. Black, and Office of Utility Consumer Counselor for the State of Indiana, pray that a writ of certiorari issue to review the orders of the U.S. Court of Appeals for the Seventh Circuit, denying an interlocutory injunction, issued May 3, 1985, reconsideration denied May 14 and May 17, 1985, and June 3, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals issued May 3, 1985 (App. 1a-4a) is unreported, as are the opinions dated May 14, 1985 (App. 5a-6a), May 17, 1985 (App. 7a-8a), and June 3, 1985 (App. 9a-12a).

The Decision of the Interstate Commerce Commission

("I.C.C."), reopening the railroad line abandonment proceeding, served September 27, 1984 (App. 13a-18a), is unreported. The I.C.C.'s Decision approving the abandonment, served April 4, 1985 (App. 19a-39a), is unreported. The I.C.C.'s Decision denying a stay pending judicial review, served Ma[illegible] 8, 1985 (App. 40a-46a), is unreported.

JURISDICTION

The order of the Court of Appeals denying an interlocutory injunction (App. 1a-4a) was entered May 3, 1985. Motions for reconsideration and rehearing were denied May 14, 1985 (App. 5a-6a), May 17, 1985 (App. 7a-8a), and June 3, 1985 (App. 9a-12a).

The jurisdiction of the Supreme Court to review orders of the I.C.C. denying interlocutory injunctions is conferred by 28 U.S.C. 2350(a) and 1254(1).

STATUTES INVOLVED

The statutes primarily involved are 49 U.S.C. 10903(a), 28 U.S.C. 2349(b), and 5 U.S.C. 705.

49 U.S.C. 10903(a):

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—
>
> (1) abandon any part of its railroad lines; or
>
> (2) discontinue the operation of all rail transportation over any part of its railroad lines;
>
> only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance.

In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

28 U.S.C. 2349(b):

The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrian or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending hearing on the application for an interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of hte damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.

5 U.S.C. 705:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

STATEMENT

This case concerns the I.C.C.'s approval of a 43-mile line abandonment in Indiana requested by Seaboard System Railroad, Inc. ("SBD"). The I.C.C.'s action, taken by a divided 4-to-3 vote, authorized SBD to abandon its line from Frankfort, Indiana, south to Indianapolis, Indiana, effective 30 days from the April 4, 1985 service of the decision. Docket No. AB-55 (Sub-No. 94), *Seaboard System Railroad, Inc. — Abandonment — in Boone, Carroll, Clinton, Hamilton and Marion Counties, IN.* (App. 19a-39a).

Petitioners represent three groups which participated in the I.C.C.'s proceedings, in opposition to the abandonment, and each filed a separate petition for review of the I.C.C.'s decision in the Court of Appeals.[1]

---

[1] Monon Shippers Association, Inc. represents numerous shippers and receivers of freight on the line; Jack O. Black represents the United Transportation Union, an organization of railroad employes; and Office of Utility Consumer Counselor for the State of Indiana presented from Indiana governmental officials, including the Lieutenant Governor.

SBD originally had requested abandonment authority for a longer 68.45-mile segment between Delphi and Indianapolis, when SBD filed its application in January, 1984. However, after hearings were held, and after an Administrative Law Judge ("ALJ") had issued an initial decision on July 10, 1984 granting the 68.45-mile abandonment, SBD three days later, on July 13, 1984, withdrew the 25.5-mile portion between Delphi and Frankfort, Indiana. Withdrawal of the 25.5 miles was based upon a commitment from A.E. Staley Company to ship significantly increased volumes of traffic to and from its Frankfort facility (App. 13a, 19a).

Based upon the revised request for abandonment of 43 miles of line between Frankfort and Indianapolis, together with the matters raised by the protestants in their administrative appeals from the ALJ's July 10, 1984 initial decision, the I.C.C. on September 27, 1984 reopened the proceeding for further hearing, to be conducted by verified statements. The I.C.C.'s schedule invited evidence from protestants, with SBD's rebuttal on December 3, 1984, followed by a final I.C.C. decision 60 days thereafter, i.e., February 1, 1985. (App. 13a-18a).

The I.C.C. did not issue its decision on February 1, 1985, but did so on April 4, 1985. (App. 19a-39a). In approving abandonment of the 43-mile line between Frankfort and Indianapolis, the I.C.C. relied heavily upon SBD's December 3, 1984 rebuttal submission, termed Appendix D in the April 4, 1985 decision, asserting operation of the line incurred a $147,469 loss during the period September, 1983 - August, 1984. (App. 28a).[2]

[2]The I.C.C. recited SBD's claim for a $229,604 loss for the period October, 1982-September, 1983 (App. 28a), but did not base its decision on $229,604, stating that all protestants did not have an opportunity to respond. (App. 20a-21a).

However, protestants to the abandonment proceeding had no opportunity either to examine the workpapers underlying the $147,469 figure or to cross-examine SBD witnesses. The September, 1983 - August, 1984 period ended subsequent to the oral hearings, and was based upon the revised proposal to abandon the lesser 43-mile segment. The data was first submitted December 3, 1984 with SBD's rebuttal, and is the only figure based upon operation of the Frankfort-Indianapolis line. Further, the April 4, 1985 decision placed the burden upon protestants to come forward with evidence to show that the changed circumstance (SBD's decision to withdraw the Delphi-Frankfort (25.5-miles) segment from the application) warrants a different result from the grant of abandonment made by the ALJ, in the absence of fraud by SBD in filing its application, or any indication that SBD timed its withdrawal to gain a tactical advantage. (App. 21a-24a).

Protestants requested a further hearing to examine SBD's rebuttal submission. The I.C.C. denied the request, stating that underlying workpapers are not required to be submitted in line abandonment cases, but could have been obtained by a contemporaneous discovery request. (App. 21a).

The I.C.C.'s decision was by a divided 4-to-3 vote. Two of the Commissioners would have granted protestants' request to reopen the proceeding, and one would have denied the abandonment outright. (App. 39a).[3]

[3]The I.C.C.'s decision does not reflect SBD's position that it would not furnish the workpapers unless the I.C.C. so requested, and that the announced February 1, 1985 decision date likewise would have precluded any meaningful analysis.

Court Proceedings

1. Petitioners filed their petitions for review in the Court of Appeals on and after April 24, 1985. As required, they first requested the I.C.C. to stay abandonment certificate, which otherwise would become effective May 4, 1985 at 12:01 A.M. F.R.A.P. 18. However, the ICC did not act upon the stay request, so petitioners filed an Emergency Application for Stay and Motion for Interlocutory Injunction late Friday, May 3, 1985 with the Court of Appeals.

The Court of Appeals early in the evening of May 3, issued a three-page order denying a stay. (App. 1a-4a).[4] The Court of Appeals did so on its understanding of the Supreme Court's interpretation of the Staggers Rail Act amendment to the line abandonment statutory provisions, as construed by this Court in *Hayfiled Northern R.* v. *Chicago and N.W. Transp.*, ____ U.S. ____, 104 S. Ct. 2610 (1984). According to the Court of Appeals, the aban-

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[4]The Court of Appeals opinion contains a number of factual errors, such as "the ICC originally permitted the Seaboard to abandon 68.5 miles of track," for the ALJ's initial decision was never adopted by the I.C.C. (App. 2a); "Seaboard then withdrew its request to abandon 25.5 miles of track, and several protesting parties asked the ICC to reopen the rest of the decision on the ground that this cast a new light on the whole application. The ICC declined in an order issued on April 4, 1985." To the contrary, the I.C.C. did reopen the proceeding at that stage. (App. 2a-3a); "The abandonment is effective at noon on May 4, 1985; the application for stay was filed on May 3, 1985." To the contrary, the abandonment would be effective at 12:01 A.M. May 15, 1985. (App. 3a). "The abandonment was approved in July 1984." The abandonment was not approved until April 4, 1985. (App. 3a). Of course, writing an opinion on very short notice increases the risk of error. Since SBD had announced it would not exercise the abandonment certificate until May 15, some 12 days later, we fail to understand why a simple temporary stay of the I.C.C.'s certificate, which otherwise would become effective May 4, 1985, was not justified.

doment of unprofitable lines is to be expedited. A stay would be contrary to such purpose:

> "We deny the application. The papers filed with this court do not cast serious doubt on the basic conclusion of the ICC – that the line is unprofitable. The Supreme Court explained last Term that Congress wanted to expedite the abandonment of unprofitable lines in order to stop the financial drain on railroad systems. *Hayfield N.R.R.* v. *Chicago & N.W. Transportation Co.*, 104 S.Ct. 2610 (1984). (App. 2a). . . .
>
> "A stay in this case would undercut the decision of Congress to speed up the abandonment of unprofitable lines. The application is accordingly denied." (App. 3a).

The test used by the Court of Appeals in determining to issue a stay is whether the I.C.C. is wrong, or likely to be wrong, citing *Coleman* v. *PACCAR, Inc.*, 424 U.S. 1301 (1976) (Rehnquist, Circuit Justice). (App. 3a).

The Court of Appeals left open the possibility of a stay at a future date to prevent dismantling of track pending judicial review. (App. 3a-4a).

2. Petitioners on May 13, 1985, and later,[5] filed supplements to their motions for an interlocutory injunction. They included the May 8, 1985 decision of the I.C.C., again by a divided 4-to-3 vote, denying a stay pending judicial review. (App. 40a-46a)[6]

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[5]Monon Shippers Association, Inc. and Office of Utility Consumer Counselor for the State of Indiana, filed a point pleading, with Jack O. Black filing separately.

[6]The I.C.C. had not acted when petitioners sought injunctive relief on May 3, 1985.

The Court of Appeals on May 14, 1985 (App. 5a-6a), and on May 17, 1985 (App. 7a-8a), by a single-judge, entered orders denying the two supplemental motions for an interlocutory injunction. The court stated its earlier order entered May 3, 1985 constituted the denial of the interlocutory injunction. Accordingly, the court treated the supplemental motions as requests for reconsideration. (App. 5a-8a).

3. Petitioners thereupon requested rehearing, and suggested rehearing en banc. This was denied June 3, 1985. (App. 9a-12a).[7] The court stated the motion for rehearing constituted a successive request for rehearing, but acknowledged that its May 3, 1985 order did not deny the application for an injunction in so many words. (App. 10a). The court reiterated its view that the standard for relief pending judicial review is a showing that the agency is probably wrong, citing *Coleman* v. *PACCAR, Inc.*, 424 U.S. 1301 (1976) (Rehnquist, J., in chambers). Further, the court emphasized its reliance upon the Staggers Rail Act amendments of 1980 as the basis for denial of relief. (App. 11a-12a):

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[7]The Court of Appeals declined to accord en banc review, stating that only full decisions on the merits may be circulated to the court. (App. 10a-11a). The June 3, 1985 order asserted that the petition for rehearing contains "intemperate if not contemptuous language," and that all the moving papers filed May 3 stated that the abandonment would occur at noon on May 4. (App. 11a fn.) The complained of language was a citation to the recent work of Judge Posner, complaining of central staff law clerk control over the judicial process. Posner, Richard A, *The Federal Courts* (Harvard, 1985), particularly "The Rise of the Law Clerk," at pp. 102-10, and "Staff Attorneys," at pp. 111-19. As to the May 3 filings, the cover pages stated the abandonment certificate would become effective 12:01 A.M. Saturday, May 4, 1985, which is midnight rather than noon. Moreover, the motion at the outset indicated that SBD had announced it would not exercise the authority granted by the certificate until May 15, 1985.

> "As we emphasized, recent changes in the law, including Staggers Rail Act amendments of 1980, were designed to speed up the abandonment process, which Congress believed had been beset by delays. See the discussion in *Hayfield Northern R..R.* v. *Chicago & N.W. Transportation Co.*, 104 S.Ct. 2610 (1984). Use of our power to grant a stay or other preliminary relief would undo part of what Congress set out to achieve. Thus although stays and preliminary injunctions continue to be available, a court should tread cautiously in granting them on the basis of claims of economic disclocation, when these claims are not backed up by solid argument establishing the I.C.C. is probably wrong. That demonstration of error is missing here, both in the initial papers and in the application for rehearing."

Since the discontinuance of service is a *de facto* abandonment of line, and the interpretation of *Hayfield* made by the Court of Appeals effectively disposes of the petitions for review on the merits, petitioners make this application for a writ of certiorari, without going through the futile task of briefing the case on the merits.

REASONS FOR GRANTING THE WRIT

This case is of exceptional importance because the decision of the Court of Appeals, if permitted to stand, effectively will preclude judicial review of an I.C.C. line abandonment decision upon any ground other than the "profitability" of the line. Further, the single test whether the I.C.C. is probaly "wrong" would govern issuance of an interlocutory injunction.

The decision of the court of appeals is in conflict with the decision of other courts of appeals since enactment of Staggers Rail Act of 1980, and with the decision of this

court in *Hayfield Northern R.* v. *Chicago and N.W. Trans.*, ____ U.S. ____, 104 S.Ct. 2610 (1984). Moreover the "wrong" standard of *Coleman* v. *PACCAR, Inc.*, 424 U.S. 1301 (1976) (Rehnquist, J., in chambers), is simply inapplicable to interlocutory injunctions involving judicial review of agency action under the Hobbs Act, 28 U.S.C. 2341, *et seq.*

I. CONGRESS IN THE STAGGERS RAIL ACT OF 1980 DID NOT INTEND TO ALTER THE SUBSTANTIVE STANDARD FOR RAILROAD ABANDONMENTS.

The Court of Appeals interpreted the decision of the Supreme Court in *Hayfield Northern R.* v. *Chicago and N.W. Transp.*, ____ U.S. ____, 104 S.Ct. 2610 (1984) to mean that Congress intended to expedite the abandonment of unprofitable lines. (App. 2a, 3a, 11a-12a). The Court of Appeals has not correctly understood the Supreme Court's opinion. The 1980 changes in the abandonment provisions of the Interstate Commerce Act were directed to expediting the time spent in processing such cases at the I.C.C. and improving the process by which abandoned lines can be subsidized. Congress did not intend any change in the statutory standards governing abandonment applications. The Senate committee report stated this objective. S. Rept. No. 96-470 (1979), at 39:

> "The abandonment provisions of this bill are designed to accomplish two major objectives: significantly reducing the time spent processing such cases at the Commission and improving the process by which abandoned lines can be subsized. *No changes are made in the standards under which the ICC decides whether or not to grant the abandonment of railroad lines.*"

The House bill contained no abandonment provision.

The Conference adopted the Senate provision. H. Rept. No. 96-1430 (Conf.) (1980), at 125.

Petitioners do challenge the asserted unprofitability of the 43-mile line, but the I.C.C.'s decision to authorize abandonment was not based solely on unprofitability. (App. 21a-39a). Moreover, the fact that a line segment is unprofitable does not mandate abandonment. *Hayfield* cannot be read in the manner suggested by the Court of Appeals.

The traditional test is that the burden on the carrier is to be balanced against the public's need for the service. *Colorado* v. *United States,* 271 U.S. 153, 168 (1926):

> "The sole test prescribed is that abandonment be consistent with public necessity and convenience . . . The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce."

This balancing process of the "public convenience and necessity" has been echoed by other decisions – since Staggers Rail Act of 1980. See: *People of State of Ill.* v. *I.C.C.*, 698 F.2d 868, 871 (7th Cir. 1983); *Black* v. *I.C.C.*, 737 F.2d 643, 650 (7th Cir. 1984); *City of Cherokee* v. *I.C.C.*, 641 F.2d 1220, 1227-28. (8th Cir. 1981), *cert. den.* 454 U.S. 892. *Georgia Public Service Com'n* v. *United States,* 704 F.2d 538, 541-42 (11th Cir. 1983).

The Supreme Court in *Southern R. Co.* v. *N. Carolina,* 376 U.S. 93 (1964), recognized that a carrier can be required to maintain service at a loss where demands of the public convenience are large. 376 U.S. at 104-5.

Although this Court does not frequently review interlocutory orders, here the Court of Appeals has set the pattern for review – profitability – which is fundamental to the further conduct of the case. *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 153 (1964). A carrier does not usually propose an abandonment where the line is profitable, so that the Court of Appeals rationale would sustain all abandonments. The real inquirty is to determine the level of unprofitability, and measure such against the inconvenience to the public. The Court of Appeals would cut off such inquiry, and doom these petitions for review.

II. THE COURT OF APPEALS IMPOSED AN IMPROPER "WRONG" TEST TO DETERMINE ISSUANCE OF AN INTERLOCUTORY INJUNCTION.

The decision of Mr. Justice Rehnquist, sitting as a Circuit Justice in *Coleman* v. *PACCARD, Inc.*, 424 U.S. 1301 (1976) (Rehnquist, in Chambers) is simply inapplicale to judicial review of administrative action under the Hobbs Act. It is not necessary that a petitioner prove the I.C.C. is "wrong" at the stay stage.

The traditional test for an interlocutory injunction under 28 U.S.C. 2349(b) is a four-fold test that embraces likelihood of success, irreparable injury, affect upon other parties, and the public interest, and perhaps other considerations. Even the I.C.C. recognizes this rule in its May 8, 1985 decision denying a stay pending judicial review. (App. 40a-41a). See: *Washington Metropolitan Area, Etc.* v. *Holiday Tours,* 559 F.2d 841, 844 (D.C. Cir. 1977); *McSurley* v. *McClelland,* 697 F.2d 309, 317 (D.C. Cir. 1982).

The Seventh Circuit has recognized more than a "wrong" standard in other injunctive situations. *Ciechon* v. *City of*

Chicago, 635 F.2d 1055 (7th Cir. 1980); *Adams* v. *Walker,* 488 F.2d 1064 (7th Cir. 1973).

Injunctive relief is particularly important in abandonment cases because there is no provision for civil damages for an abandonment that has been approved by the I.C.C. – injunctive relief is the sole remedy. *Chicago & N.W. Tr. Co.* v. *Kalo Brick & Tile,* 450 U.S. 311, 322-23 n.10 (1981).

The cessation of railroad service over a line is a serious matter. State agencies can secure injunctive relief against an unlawful abandonment, so severe is the effect upon commerce. See: *I.C.C.* v. *Baltimore and Annapolis Railroad Co.,* 398 F. Supp. 454 (D.Md. 1975), and citations at 461-64.

The I.C.C. was split 4-to-3 in this important line abandonment case. Serious questions are presented, as the I.C.C. itself conceded. (App. 15a-16a). Yet the failure of the Court of Appeals to grant a stay effectively ends the matter, for there can be no effective judicial review if service ceases for any extended period of time.

The "wrong" standard is itself "wrong," particularly when applied to an "unprofitable" test for reviewing I.C.C abandonment decisions.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted.

Respectfully submitted,

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June 28, 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 3, 1985.

Before
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

85-1679 MONON SHIPPERS ASSOCIATION, INC, an Indiana Corporation Petitioner, vs. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA	]]]]]]]	Petition for Review of Decision of the Interstate Commerce Commission
85-1680 JACK O. BLACK Petitioner vs. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA Respondents	]]]]]]]]	
85-1754 OFFICE OF UTILITY CONSUMER COUNSELOR for the STATE OF INDIANA Petitioner vs. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA Respondents	]]]]]]]]]	

This matter comes before the court for its consideration of the:

1) "EMERGENCY APPLICATION FOR STAY* AND MOTION FOR INTERLOCUTORY INJUNCTION" filed herein on May 3, 1985 by counsel for the petitioners;

2) "EMERGENCY APPLICATION FOR STAY AND MOTION FOR INTERLOCUTORY INJUNCTION" filed herein on May 3, 1985 by counsel for petitioner, Jack O. Black:

3) "REPLY TO ANTICIPATED MOTIONS FOR STAY" filed herein on May 3, 1985 by counsel for Seaboard System Railroad, Inc.

4) "SUPPLEMENT TO REPLY TO ANTICIPATED MOTIONS FOR STAY" filed herein on May 3, 1985 by counsel for Seaboard System Railroad, Inc.

Petitioners seek to stay an order of the ICC allowing the Seaboard System Railroad to abandon 43 miles of track in Indiana. The ICC originally permitted the Seaboard to abandon 68.5 miles of track. Seaboard then withdrew its request to abandon 25.5 miles of track, and several protesting parties asked the ICC to reopen the rest of the decision on the ground that this cast a new light on the whole application. The ICC declined, in an order issued on April 4, 1985. The abandonment is effective at noon on May 4, 1985; the application for a stay was filed on May 3, 1985.

We deny the application. The papers filed with this court do not cast serious doubt on the basic conclusion of the ICC – that the line is unprofitable. The Supreme Court explained last Term that Congress wanted to expedite the abandonment of unprofitable lines in order to stop the financial drain on railroad systems. *Hayfield N.R.R. v. Chicago & N.W. Transportation Co.*, 104 S. Ct. 2610 (1984). It removed some procedural obstacles to abandonment and allowed states and other governmental

bodies to prevent abandonment only by making service worth the railroads' while — by making offers of subsidy deemed sufficient by the ICC (or, as in *Hayfield,* by condemning the line and paying the full market price). Movants do not assert that the appropriate bodies have made offers of subsidy to keep this line going; certainly there has been plenty of time to do so. (The abandonment was authorized in July 1984).

A court must presume the decision of an administrative agency is lawful. The fact that the decision raises difficult legal and factual issues does not permit a court to issue a stay. *Coleman v. PACCAR, Inc.,* 424 U.S. 1301 (1976) (Rehnquist, Circuit Justice). The moving papers here do not persuade us that the ICC is wrong, or even likely to be wrong. Certainly the fact that a railroad has changed its mind about some of the track it wanted to abandon suggests that there is new information, but it does not compel the conclusion that the ICC must reopen the decision with respect to the whole line. Presumably railroads do not lightly abandon profitable lines. The ICC may consider the railroad's regard for its self-interest, as well as the evidence in the original record, in making a decision.

A stay in this case would undercut the decision of Congress to speed up the abandonment of unprofitable lines. The application is accordingly denied.

Seaboard has represented that it does oppose the grant of a stay limited to an order preventing the dismantling of track. We do not think such a stay is appropriate; there is no visible ground on which to conclude that the ICC probably erred, and its order must stand. Nonetheless, out of recognition that this decision is being made expeditiously, I order the Seaboard to provide the movants with 14 days' notice of any plan to remove the track or otherwise make the line unsuitable for rail service in the event this court

ultimately sets aside the ICC's order. The movant then may renew their request for a stay, limited to the destruction of the track, provided they give this court at least seven days in which to act.

SO ORDERED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 14, 1985.

Before
Hon. FRANK H. EASTERBROOK, Circuit Judge

85-1679 MONON SHIPPERS ASSOCIATION, INC, an Indiana Corporation Petitioner, vs. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA	]]]]]]]	Petition for Review of Decision of the Interstate Commerce Commission
85-1680 JACK O. BLACK Petitioner vs. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA Respondents	]]]]]]]]	
85-1754 OFFICE OF UTILITY CONSUMER COUNSELOR for the STATE OF INDIANA Petitioner vs. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA Respondents	]]]]]]]]]	

This matter comes before the court for its consideration of the "SUPPLEMENT TO MOTION FOR INTERLOCUTORY INJUNCTION" filed herein on May 13, 1985, by counsel for Petitioner, Jack O. Black.

We note that by our May 3, 1985, order denying petitioner's emergency applications, we denied both a temporary stay and a stay pending a decision on the merits of these appeals, the relief petitioners term an "interlocutory injunction." Construing petitioner's SUPPLEMENT TO MOTION FOR INTERLOCUTORY INJUNCTION as a motion to reconsider our May 3, 1985, order,

IT IS ORDERED that the SUPPLEMENT TO MOTION FOR INTERLOCUTORY INJUNCTION is hereby DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 17, 1985.

Before
Hon. FRANK H. EASTERBROOK, Circuit Judge

85-1679 MONON SHIPPERS ASSOCIATION, INC, an Indiana Corporation Petitioner, vs. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA	]] Petition for] Review of] Decision of] the Interstate] Commerce] Commission
85-1680 JACK O. BLACK Petitioner vs. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA Respondents	]]]]]]]]
85-1754 OFFICE OF UTILITY CONSUMER COUNSELOR for the STATE OF INDIANA Petitioner vs. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA Respondents	]]]]]]]]]

This matter comes before the court for its consideration of the "PETITIONERS' SUPPLEMENT TO MOTION FOR INTERLOCUTORY INJUNCTION.

As we noted in our May 14, 1985, order, we denied each petitioner's request for a temporary stay, as well as a stay pending appeal ("interlocutory injunction") on May 3, 1985. Construing PETITIONERS' SUPPLEMENT TO MOTION FOR INTERLOCUTORY INJUNCTION as a motion to reconsider our May 3, 1985, order,

IT IS ORDERED that PETITIONERS' SUPPLEMENT TO MOTION FOR INTERLOCUTORY INJUNCTION is hereby DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 3, 1985.

Before
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

85-1679	]	
MONON SHIPPERS ASSOCIATION, INC,	]	Petition for
an Indiana Corporation	]	Review of
Petitioner,	]	Decision of
vs.	]	the Interstate
INTERSTATE COMMERCE COMMISSION and	]	Commerce
UNITED STATES OF AMERICA	]	Commission
	]	
85-1680	]	
JACK O. BLACK	]	
Petitioner	]	
vs.	]	
INTERSTATE COMMERCE COMMISSION and	]	
UNITED STATES OF AMERICA	]	
Respondents	]	
	]	
85-1754	]	
OFFICE OF UTILITY CONSUMER COUNSELOR	]	
for the STATE OF INDIANA	]	
Petitioner	]	
vs.	]	
INTERSTATE COMMERCE COMMISSION	]	
and UNITED STATES OF AMERICA	]	
Respondents	]	

This matter comes before the court for its consideration of the Petition for Rehearing and Suggestion for Rehearing En Banc filed on May 28, 1985, by counsel for all three

petitioners. Petitioners seek rehearing of the order of May 3 in which the court declined to stay or enter a preliminary injunction against the decision of the ICC, which permitted the abandonment of some 43 miles of track in Indiana.

The order of May 3 denied the requests for interlocutory relief in full. The last paragraph of the order invited the applicants to return here only on a showing that the demolition of the track was imminent. It is clear on any reasonable reading of the order that we did not contemplate further proceedings of any sort (other than timely decision by the merits panel) unless that eventuality should be threatened. We had the authority to dispose of the motions in this fashion. 28 U.S.C. §2349(b) is designed to give the government five days' opportunity to respond so that it may make known arguments in opposition to interlocutory relief. It is not a freeze that prohibits the immediate denial of applications that, on the papers before the court (including the ICC's decision and the railroad's response), appear to be unpersuasive.

After our order of May 3, petitioners filed two further papers, designated "supplements" to the earlier motions, that vigorously attacked both the decision of May 3 and the reasoning of the accompanying opinion. Because these documents were attacks on the order, the court treated them as motions to reconsider. We denied them on the merits.

The current petition, filed on May 28, continues the attack on the order of May 3. This petition is a successive request for rehearing. The court's rules do not provide for successive applications of this nature, and the current petition is denied for that reason. (It may also be untimely, because not filed within 14 days of May 3, but we let this pass because the order of May 3 did not deny the application for an injunction in so many words.) Moreover, it is

the court's policy not to rehear en banc decisions on motions; only full decisions on the merits may be reheard en banc. Thus the request for reconsideration en banc is denied without circulation to the court.

Nonetheless, we take the opportunity to point out that the petitioners misinterpret the basis for the order of May 3. The court did not hold that interim relief is never available in an abandonment case.* The point of the opinion is that an administrative order is presumed valid and may be set aside pending review only if the petitioner makes a substantial showing that the agency is probably wrong. *Coleman v. PACCAR, Inc.*, 424 U.S. 1301 (1976) (Rehnquist, J., in chambers). Our review of the applications for interlocutory relief, together with the decision of the ICC, did not reveal convincing grounds for a belief that the ICC was probably wrong The scope of review is very narrow, see *Black v. ICC*, 737 F.2d 643, 650 (7th Cir. 1984), and the ICC's order here appears to address the essential issues.

The argument that there should nevertheless be a stay pending review because of the adverse economic effects of the abandonment and the difficulty that would be encountered in recommencing service does not supply an adequate reason to set aside the decision. As we emphasized, recent changes in the law, including the Staggers Rail Act amendments of 1980, were designed to speed up the

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*The petition for rehearing, especially at 6-7, contains certain intemperate if not contemptuous language. Counsel should be aware that they do not advance their pleadings nor their professional standing by heaping abuse on the court and its staff. Indeed, we are dismayed that counsel should profess "shock" that the court acted on May 3 in response to papers filed that day. All the moving papers stated on their covers that the abandonment would occur at noon on May 4. We responded with immediate consideration of a matter represented to require immediate attention.

abandonment process, which Congress believed had been beset by delays. See the discussion in *Hayfield Northern R.R. v. Chicago & N.W. Transportation Co.*, 104 S. Ct. 2610 (1984). Use of our power to grant a stay or other preliminary relief would undo part of what Congress set out to achieve. Thus although stays and preliminary injunctions continue to be available, a court should tread cautiously in granting them on the basis of claims of economic dislocation, when these claims are not backed up by solid argument establishing that the ICC is probably wrong. That demonstration of error is missing here, both in the initial papers and in the application for rehearing.

This does not mean that petitioners are bound to lose. Quite the contrary, the decision ultimately rests in the province of the merits panel. Sometimes cases seem more meritorious after full briefing and quiet contemplation than they do at the time of emergency motions. But the possibility that the petitioners will prevail does not now appear sufficiently substantial that we should forbid implementation of the administrative decision in the interim.

The petition for rehearing is denied.

APPENDIX E

SERVICE DATE 9-27-84

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-55 (Sub-No. 94)

SEABOARD SYSTEM RAILROAD, INC. – ABANDONMENT – IN BOONE, CARROLL, CLINTON, HAMILTON AND MARION COUNTIES, IN

Decided: September 20, 1984

On January 7, 1984, Seaboard Systems Railroad, Inc. (SBD), filed an application for abandonment of a line of railroad extending from Milepost B-112.00 near Delphi, IN to Milepost B-180.45 at Indianapolis, IN, a distance of 68.45 miles in Boone, Carroll, Clinton, Hamilton, and Marion Counties, IN. The proceeding was designated for oral hearing on March 30, 1984, and on July 10, 1984, an initial decision was served granting the application in its entirety.

By letter dated July 13, 1984, applicant informed the Commission that based upon a commitment from a shipper, A.E. Staley Company, to ship "significantly increased volumes of traffic" to and from its Frankfort, IN facility, it withdraws its abandonment application with respect to a 25.5 mile segment of the line between Delphi and Frankfort, IN. SBD now intends to abandon only that portion of the line between Frankfort and Indianapolis.

Several protestants have appealed the initial decision.[1]

[1] Jack O. Black, Indiana Legislative Director for United Transportation Union (UTU), International Minerals & Chemical Corporation (IMC), Erbrich Products Company, Inc., and jointly, Monon Shippers Association, Inc. (MSA) and Wicks Lumber Company (Wicks).

UTU, IMC, MSA, and Wicks contend, among other things, (a) that SBD's partial withdrawal of the application constitutes "changed circumstances" requiring either dismissal of the application or further hearing, and (b) that applicant, a part of the CSX Corporation controlled system of railroads, interchanges one-third of the traffic originating or terminating on the line with the Baltimore and Ohio Railroad Company (B&O), and has failed to submit evidence establishing the effect of the proposed abandonment on the other members of the system, particularly B&O, as required by 49 C.F.R. 1152.22(d)(5). Appellants urge that the application be dismissed or reopened for further hearing. Based on these and other arguments raised in the pleadings, we decided to hear their appeals by decision served August 9, 1984.

In its reply, applicant asserts that because abandonment authority granted under 49 U.S.C. 10903 is permissive it would be free to exercise as little or as much of such authority as it chooses. Thus, it contends that partial withdrawal of a portion of the application does not require dismissal of the application or further hearing. SBD also denies that it is under common control and management with Chessie Systems carriers within the meaning of 49 C.F.R. 1152.22(d)(5). However, applicant concedes that the issue presents close questions, and in the event the Commission should disagree with its reasoning, urges that we grant appellants' motions to reopen the proceeding for further hearing, rather than dismiss the application. It has tendered additional evidence consisting of:

(a) revised base year revenue and operating cost information for the entire line including cost and revenue data for branch traffic handled on the Chessie System;

(b) revised base year revenue, operating cost and op-

portunity cost information for the Frankfort-Indianapolis segment of the line;

(c) updated revenue and oeprating cost information for the Frankfort-Indianapolis segment of the line for the period between April 1983 and March 1984, inclusive; and

(d) verified statements providing explanation of how the revised data was derived.

MOTIONS TO REJECT

On September 6, 1984, UTU filed a motion to reject, or alternatively to strike portions of, applicant's reply. On September 13, 1984, MSA and Wickes jointly filed a motion seeking identical relief on identical grounds. Appellants argue that insofar as reopening is sought, the pleading is, in reality, an "appeal" and not a "reply" within the meaning of 49 CFR 1152.25 (e)(3) permitting replies to be filed within 15 days of service of our decision to hear the appeals, and thus not timely filed. Appellants further contend that the reply exceeds the 30-page limit imposed by 49 CFR 1152.25(e)(4). Appellants argue that accepting applicant's tendered additional evidence would be prejudicial to appellants, who will have no opportunity to cross-examine the witnesses and examine the working papers underlying the proffered financial exhibits.

DISCUSSIONS AND CONCLUSIONS

Under 49 U.S.C. 10327(g)(1) the Commisison may reopen a proceeding and grant rehearing because of material error, new evidence, or substantially changed circumstances. Appellants have raised what applicant concedes and what we agree to be difficult and important issues presenting close questions under existing law and precedent. Further, expedition and sound decisionmaking will

best be served by deciding these and other issues raised in the appeals in light of a record augmented by the new evidence tendered in applicant's reply and protestants' responses. We will, accordingly, reopen the proceeding for further hearing under the modified procedure and accept applicant's tendered additional evidence. Protestants' verified reply statements will be due 45 days from the date of service of this decision, and applicant's rebuttal will be due 20 days from the date protestants' statements are due.

Under these circumstances appellants' motions will be denied. Whether applicant's alternative request for reopening is properly characterized as a "reply," an "appeal," or something else is immaterial in our view. It is responsive to issues raised and motions embraced in appellants' appeals, and doubtless would not have been made in the absence of such appeals. The term "reply" used in 49 C.F.R. 1152.25(e)(3) is sufficiently broad to cover requests of this nature. Moreover, we do not believe that the 30 page limitation on appeals and replies set forth in 49 C.F.R. 1152.25(e)(4) has been violated. The body of the pleading is 28 pages and within the limit. The appendixes are comprised entirely of tendered additional evidence, and in this context properly may be considered separate documents, rather than a part of the reply (even though they happen to be stapled to the pleading). In any event, the length limitation of 49 C.F.R. 1152.25(e)(4), like all pleading specifications, is for the benefit of the Commission, not the parties. Its specific purpose is to aid the Commission in issuing decisions within the time frames imposed by the statute. Where, as here, reopening of the proceeding is warranted, expedition is aided rather than hindered by having applicant's evidence before us at the earliest possible time. Appellants also benefit from the ad-

ditional time available for the consideration of a response. UTU's other claim of prejudice is without merit. The modified procedure schedule adopted in this decision provides appellants ample opportunity to respond to the new evidence and to submit additional evidence of their own. Moreover, appellants have available the discovery procedures set forth in 49 C.F.R. 114.21 *et seq.*

Because of our action, it will not be possible to meet the October 5, 1984, deadline prescribed in 49 U.S.C. 10904 for issuance of a final decision in this proceeding. While the Staggers Rail Act of 1980 reflects a strong congressional policy in favor of expeditious action, those deadlines are not so inflexible as to prevent us, in appropriate cases, from accepting and evaluating new evidence that is necessary to a reasoned disposition of important and troublesome issues, and from according the parties the opportunity to respond, which due process and fairness require. Because section 10327(g)(1) imposes no time limits for decision, reopening this proceeding, in effect, removes it from the time frames imposed by 49 U.S.C. 10904. However, we intend to issue a final decision 60 days after the due date for applicant's rebuttal specified in this order.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The motions of UTU, MSA, and Wickes to reject or strike portions of the applicant's reply are denied.

2. This proceeding is reopened for further hearing.

3. The tendered Exhibits 1 through 3 and Appendices A through C embraced in applicant's reply to the appeals are accepted.

4. Protestants' verified reply statements are due on December 3, 1984.

5. Applicant's verified statement in rebuttal is due on December 3, 1984.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett, Gradison, Simmons, Lamboley, and Strenio. Commissioners Lamboley and Strenio did not participate.

James H. Bayne
Secretary

(SEAL)

APPENDIX F

SERVICE
DATE
4-4-85

INTERSTATE COMMERCE COMMISSION

Docket No. AB-55 (Sub-No. 94)

CERTIFICATE AND DECISION

SEABOARD SYSTEM RAILROAD, INC. – ABANDONMENT – IN BOONE, CARROLL, CLINTON, HAMILTON AND MARION COUNTIES, IN

Decided: March 19, 1985

By application filed January 27, 1984, the Seaboard System Railroad, Inc. (SBD), sought to abandon, under the provisions of 49 U.S.C. 10903 and the Commission regulations at 49 C.F.R. Part 1152, a 68.5-mile line of railroad known as the Indianapolis Branch. The line extends from milepost B-112 near Delphi, IN to milepost B-180.45 at Indianapolis, IN, in Boone, Carroll, Clinton, Hamilton, and Marion Counties, IN. Protests and comments were filed, and the application was designated for oral hearing. In an initial decision served July 10, 1984, the Administrative Law Judge (ALJ) granted the application in its entirety.

By letter dated July 13, 1984, SBD informed the Commission that, based upon a commitment from A.E. Staley Company (Staley) to ship significantly increased volumes of traffic to and from its Frankfort, IN facility, it withdrew its application with respect to a 25.5 mile line segment beteen Delphi and Frankfort, IN.

In response to various requests for reconsideration, further hearing, or dismissal of the application filed by cer-

tain protestants[1], and applicant's reply including additional evidence, we reopened the proceeding for further hearing under the modified procedure, accepted the tendered additional evidence, and established dates for the submission of additional statements. *See* decision served September 27, 1984.[2] Reply statements were filed by UTU, Erbrich, and jointly by MSA and Wickes. Applicant filed a rebuttal statement.

PRELIMINARY MATTERS

UTU moves to strike applicant's rebuttal statement and to either dismiss the application for failure of proof or set it for further oral hearing. Protestant argues that the verified statement of Mr. Vernon Willinger and the attached financial exhibits, appendixes D and E, contain new evidence and constitute improper rebuttal. The request will be denied. Appendix D is a corrected version of Appendix C to applicant's reply to the appeals. The corrections affect only three accounts, and represent a reduction of on-branch costs of approximately five percent. They were made in direct response to criticisms raised in protestant's reply statement. Appendix E is an updated version of Appendix B to applicant's reply to the appeals, covering September 1983 through August 1984. We will not base our decision on the specific calculations in Appendix E since all protestants have not had an opportunity to res-

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[1] Jack O. Black, Indiana Legislative Director for United Transportation Union (UTU), International Minerals & Chemical Corporation (IMC), Erbrich Products Company, Inc., and jointly, Monon Shippers Association, Inc. (MSA) and Wicks Lumber Company (Wicks).

[2] In that decision we denied a motion by UTU to reject the tendered additional evidence. On November 16, 1984, Erbrich filed a motion to strike based on identical grounds. It will be denied for the reasons stated in the prior decision.

pond fully. However, consideration of Appendix E would not prejudice UTU since all protestants responded to it at considerable length in its motion to strike, which we will treat and accept as a reply. Protestant's purpose in seeking further hearing is to examine the underlying work papers, which are not required to be submitted in abandonment proceedings, and which protestant could have obtained by a contemporaneous discovery request.[3]

Erbrich requests leave to file a late-tendered affidavit. SBD moves to deny the request, or alternatively, to cross-examine the sponsor. The affidavit will be accepted and SBD's request is denied. In the interests of reaching a decision on a complete record, and in view of protestant's obvious unfamiliarity with our procedures, we will consider it, along with the reply comments contained in protestant's motion.

DISCUSSION AND CONCLUSIONS

The Partial Withdrawal Issue. Although we reopened this proceeding because of the many and difficult issues raised in the appeals, we did not specifically discuss the propriety or effect of applicant's partial withdrawal of its abandonment request. Protestants suggest that the disclosure of applicant's intention to serve the northern portion of the line between Delphi and Frankfort is a "changed circumstance" rendering all evidence previously submitted obsolete. They argue that no conclusion as to the Frankfort-Indianapolis southern segment can be drawn from financial evidence for the entire line. They also argue that costs for the southern segment cannot be determined

[3]Motions for further oral hearing embraced in the reply statements of UTU, MSA, and Wickes will be denied for similar reasons.

by simple proration because, in UTU's view, the Staley operation will make service on the southern segment more economical, while in IMC's view, the northern segment was the "high cost" portion and the southern segment, if independently viewed, would demonstrate profitable operations. Additionally, IMC contends that applicant's decision to continue operations on the northern segment discriminates against shippers located on the southern segment in violation of 49 U.S.C. 10741(b).

We disagree. The effect of a request for partial withdrawal of an abandonment application made after the service of a decision granting the abandonment has not been explicitly considered by the Commission.[4] However, the Commission has stated on many occasions that authority granted in an abandonment proceeding is permissive, and the extent to which an abandonment is consummated is a matter solely within the carrier's discretion.[5] Had SBD waited until a certificate was issued in this proceeding, it could have achieved the same result with no basis for complaint from protestants. Absent indications of fraud or abuse of our procedures, the timing of applicant's disclosure of its intentions is immaterial. We conclude that there is no statutory or regulatory impediment to a partial withdrawal request and accept the proposed amendment to the application.

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[4]A partial withdrawal was accepted without comment after the period for filing offers of financial assistance had expired in Docket No. AB-1 (Sub-No. 96F), *Chicago and North Western Transportation Company – Abandonment – Between Carroll and Harlan, La.* (not printed), served September 9, 1981.

[5]See, e.g., *Chicago N.S. & M Ry. Abandonment of Entire Operation*, 317 I.C.C. 363, 367 (1962); *Delaware & H.R. Corp. Trackage Agreement Modification*, 290 I.C.C. 103, 106 (1953); and *Southern Pac. Co. Abandonment*, 158 I.C.C. 439, 443 (1929).

There remains the question of whether our acceptance of applicant's partial withdrawal requires a new evidentiary presentation. As a matter of law, it does not. Applicant's decision to continue operations on the northern portion of the line is a changed circumstance, but protestants have not demonstrated that it is a changed circumstance that would alter the result reached by the ALJ. In seeking reopening, the burden is clearly on the proponents to submit evidence supporting their request.[6] Protestants' contentions that costs are unevenly distributed over the line,[7] and that the Staley traffic will result in economic operations on the southern segment, are similar to those directed against SBD's most recent financial statements and will be considered later in this decision. IMC's "discrimination" argument also is not persuasive. Virtually all abandonments except, perhaps, those involving a carrier's entire operation, result in a loss of service by some and continued service to other proximately located shippers. This is not the type of discrimination addressed by 49 U.S.C. 10741(b). Finally, there is no suggestion that SBD filed a fraudulent application knowing at the time that it

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[6]*See Illinois* v. *I.C.C.* No.742 F.2d 1460 (7th Cir. 1984), which denied a petition for review of the Commission's denial of a request to reopen an abandonment proceeding on petitioners' assertions that the granting of abandonment authority over an adjacent line would have reduced the costs of operating the line under consideration. The court upheld the Commission's findings that the evidence submitted in support of the application was correct and accurate when it was filed; that the burden of proof was on protestants to demonstrate the materiality of intervening circumstances with evidence; and that they had not met it.

[7]If it were true that the northern segment is responsible for the greatest share of costs, protestants could and should have sought a partial abandonment, and born the burden of establishing the viability of the southern segment. *See State of Me. Dept. of Transp.* v. *I.C.C.*,587 F.2d 541, 543 (1st Cir. 1978).

would continue service to Staley. Nor is there any other indication that applicant timed its partial withdrawal request to gain a tactical advantage.

Were there no other issues requiring a reopening, we would have decided the appeals on the basis of the record made at the oral hearing. However, since reopening was necessary in view of applicant's failure to submit evidence of the effect of the proposed abandonment on other members of the Chessie System, and since applicant has voluntarily submitted and protestants have replied to additional evidence relative to the financial performance of the southern portion of the line, we will consider this evidence in ruling on the amended application.

The Family System Issue. Applicant is a subsidiary of CSX Corporation, which also controls the Baltimore and Ohio Railroad Company (B&O), and the Chesapeake and Ohio Railway Company (C&OI), both known as the Chessie System. Nevertheless, SBD did not include with its application evidence concerning the impact of the abandonment on members of the Chessie System as required by 49 C.F.R. 1152.22(d)(5).[8] The ALJ concluded that because SBD and the other subsidiaries of CSX are separate corporations under separate management and keep separate accounts, applicant is not operated as part of a "system

[8] "If the line to be abandoned. . .is operated as a part of a system under common control and management, a detailed statement showing the effect of the proposed abandonment. . .on the net railway operating income of the other individual members of the system. . ." must be included in the abandonment application.

under common control and management" and therefore is not required to submit such evidence.[9]

We disagree with that conclusion. In *Lehigh Valley Railroad Company Abandonment,* 338 I.C.C. 793, 800 (1972), the Commission discussed the rule. It found that "Whenever . . . two railroads exist as part of a railroad 'system' or 'family' the public interest dictates that for purposes of analyzing financial data pertaining to a proposed abandonment by one, the financial effect on the other must be taken into consideration." It further stated that "In determining whether in fact such a "system" exists, common control and management serves as the primary indicator, and is of itself sufficient to establish the need to require the inclusion of off-branch revenues," *Id. See also Abandonment by Brownwood North & South Ry.,* 105 I.C.C. 729, 736 (1926), in which the Commission stated "Where a subsidiary of a large system seeks to abandon its line it is , . . . of great importance in considering whether the line is being operated at a loss, especially where most of the traffic is interchanged with other lines

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[9]UTU now takes the position that if the application is dismissed with respect to the Delphi-Frankfort segment, the impact on the revenues of other members of the Chessie System will be *de minimus* and the issue need not be considered further. UTU's characterization of Chessie's impact on the southern segment is correct. The Chessie System's revenues and costs resulted in a net increase of $6,742 in avoidable loss during the October 1982 – September 1983 base year and were stated to be *de minimus* and not supplied for subsequent periods.

Nevertheless, we will address this question because UTU is not the only protestant to have raised the issue, and discussion will provide needed guidance to SBD in its prosecution of future abandonment applications.

of the same system, to know what apportionment is made of system revenues from such traffic."[10]

Common management and control was found in *Blackshear Mfg. Co.* v. *A.C.L.R.R. Co.*, 87 I.C.C. 654, 664 (1924), to refer to "carriers generally controlled through ownership, lease, or otherwise to the extent of controlling traffic policy, even through separate corporate entity may be maintained." This definition has been consistently applied: (i) to determine whether single-line or joint-line rate scales shall be prescribed; (ii) in proceedings concerning discrimination and undue prejudice; and (iii) in questions of short-hauling. *See Chicago, M., St. P. & P.R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 467-469 (1957). The cases following the *Blackshear* definition are legion.

In *CSX Corp.-Control — Chessie and Seaboard C.L.*, 363 I.C.C. 518 (1980, the Commission approved the acquisition by CSX Corporation, a non-carrier holding company, of the rail carrier's subsidiary to Chessie System, Inc., and Seaboard Coast Line Industries, Inc. (SCLI), SBD's predecessor. While former SCLI and Chessie System carriers would, as wholly-owned subsidiaries of CSX, retain their corporate identities, have separate management, and keep separate accounts, based upon CSX representations the decision stresses that they would be operated as a single system *with CSX dictating corporate policy and priorities to the end of maximizing system profits. Id.* at 553. In fact, coordinated, single system service was cited as the principal benefit of the consolidation, and it was specifically noted that the managers of the individual roads would be expected to subordinate their interests to the benefits of the system. At the hearing, applicant's

[10]The rule has consistently been upheld by the courts. *See* the decisions cited in the ALJ's initial decision.

operating witness testified that SLI and other Chessie System carriers would cooperate, rather than compete. Additionally, the members of the Chessie System, B&O, and C&O consider themselves part of a "family system" because they have consistently supplied the information required by 49 C.F.R. 1152.22(d)(5) in their abandonment applications. While the rail subsidiaries of CSX may have separate corporate identities, separate officers, separate accounts, and may even enjoy a measure of autonomy, there can be no real independence as long as they are all wholly-owned subsidiaries of CSX, and the latter takes an active role in establishing policy. Thus, applicant is a member of a family or system of carriers within the meaning of 49 C.F.R. 1152.22(d)(5), and is required to submit evidence of financial impact of the abandonment on other members of the system.

Financial Performance of the Line. Applicant's financial evidence submitted with the application and corrected at the hearing reflected, for the base year October 1982 through September 1983, attributable revenues of $1,688,007, avoidable loss from operations of $211,312, and opportunity costs of $988,514. In its reply to the appeals and in its rebuttal in the reopened proceedings, applicant has submitted revised data applicable only to the Frankfort-Indianapolis segment for the same period and for the subsequent period September 1983 through August 19874. These exhibits are summarized as follows:

	Oct 82 - Sept 83[11]		Sep 83 - Aug 84[12]	
Revenues	$1,033,610		$ 930,777	
Avoidable costs	1,263,214		1,078,246	
on-branch		382,035		413,098
off-branch		881,179		665,148
Avoidable loss	229,604		147,469	

Protestants' objections to the financial data fall into three categories: (i) the accuracy and trustworthiness of the exhibits; (ii) the relevance of the exhibits in light of recent developments; and (iii) the treatment of specific revenue and cost items. A number of the arguments raised in the appeals and in protestants' reply statements are moot because they involve the Delphi-Frankfort segment, or are superseded by more recent evidence. Only those matters still in dispute will be addressed.

Protestants question the accuracy and trustworthiness of the data submitted in the reopened proceedings based on the numerous mistakes discovered in the various financial exhibits at all stages of the proceedings. The original financial exhibits submitted with the application and to a lesser extent the exhibits submitted in applicant's reply to the appeals required corrections. However, these were the result of only a few errors, some of which affected several accounts. The mistakes were promptly acknowledged and corrected by applicant when pointed out. We cannot conclude that the revised exhibits are untrustworthy.[13] Fur-

[11]Source: Appendix B, reply to appeals as corrected by Appendix E, rebuttal.

[12]Source: Appendix D, rebuttal. Supersedes Appendix C to reply to appeals, which covered the period April 1983 to March 1984.

[13]UTU's additional contention that the Commission does not have data for the Frankfort – Indianapolis segment "for the preceding 2 calendar years and the current year" is also entitled to little consideration. The 2 year requirement of 49 C.F.R. 1142.22(d) specifies the contents of an initial application. It does not apply to reopened proceedings.

ther, even after adjustments most favorable to protestants, the financial exhibits show that the southern segment is losing money.

Protestants also argue that two events destroy the relevance of all of the financial data submitted. As noted in the initial decision, applicant stopped serving an Indianapolis-based shipper, Star/News, in May of 1983 and the traffic cannot be recaptured. Consequently, SBD excluded from its base year data the costs and revenues attributable to this shipper. UTU contends that applicant eliminated only car costs for this traffic, resulting in an overstated avoidable loss for the line. However, applicant points out that in addition to car costs, it also excluded switching charges and off-branch costs. Protestant did not suggest any other accounts that would be specifically affected. We are satisfied that the Star/News traffic costs have been eliminated from SBD's financial statements and that SBD's costs are not overstated.

More generally, UTU argues that a greatly reduced level of service on the Frankfort-Indianapolis segment, due to the loss of the Star/News traffic, should result in significantly lower costs than are reflected in applicant's financial exhibits. UTU counters applicant's most recent figure of 128 trips per month on the southern segment with a 78-trip figure based on the union's statistics. The argument is unpersuasive. First, there is no explanation by protestant as to how its figures were derived. Additionally, we do not consider the level of service relevant unless translated into revenue and cost terms, which UTU has not done.

UTU also contends that the expanded operation for Staley affects the validity of the existing financial data. It points out that applicant derived costs for the southern

segment by proration of the cost accounts applicable to the entire Delphi-Indianapolis line, and argues that the "vast" increase in service to Staley renders the apportionment ratios obsolete. Applicant's most recent data for the period September 1983 to August 1984 is based not on proration, but on actual line statistics. Further, the revised base year exhibit, which admittedly employed proration, is not affected by the enhanced Staley oepration, which did not commence until after September 1983.[14] Any conclusions regarding the effect of the Staley operation are speculative at best. The existing financial data provides the best evidence of future financial performance of the line.

Protestants, particularly UTU, have raised a number of specific objections to the revenue and cost data. UTU claims that base year revenue figures do not include revenues from TOFC operations, and from the rental to shippers of side tracks. As to the former, applicant indicated that while it closed its Indianapolis ramp in October 1983, it had ceased handling TOFC shipments on the line prior to that time, in favor of trucking them to other ramp locations. Consequently there were not TOFC revenues to include. Rental income from side tracks was admittedly not included in the base year exhibits, and we will assume it was not included in subsequent exhibits, since there is no indication to that effect from applicant. Protestant does not claim that the amounts involved are significant. Protestant does not claim that the amounts involved are significant. We conclude that the financial exhibits reflect attributable revenues with substantial accuracy.

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[14]UTU's additional argument that because of the Staley traffic, the southern segment has unreflected value as a "feeder line' is unsubstantiated. There is no indication in the record as to how much, if any, Staley traffic would move over the Frankfort-Indianapolis segment.

As to costs, UTU claims that locomotive and fuel expenses were overstated because SBD employed system average costs for 6-axle units in computing the various relevant cost accounts even though the line south of Frankfort is restricted to smaller 4-axle units. We conclude that locomotive and fuel expenses were property derived. On-branch locomotive maintenance, depreciation, fuel, and return on investment accounts are determined (in part) by apportioning system average unit costs to the branch on a time or mileage basis as appropriate. The only breakdown of costs required by our regulations is between diesel and electric units and between yard and road locomotives. *See* 49 C.F.R. 1152.32(h) and 1152.33(b) and (c). Actual expenses for specific units are required only when "specialized equipment" is "devoted exclusivley" to service on the branch, which has not been shown to be the case. 49 C.F.R. 1152.33(b)(1). The locomotive related costs submitted by SBD were computed in accordance with our regulations, and are thus to be considered avoidble unless shown to be not truly avoidable. *See Illinois Central Gulf R. Co. – Abandonment,* 363 I.C.C. 93, 103 (1980). We have, on occasion, accepted alternative cost computations based on a different methodology than that used in regulations when clearly shown to represent the best evidence of the costs in question. *See* Docket No. AB-6 (Sub-No. 163), *Burlington Northern Railroad Company – Abandonment and Discontinuance of Trackage Rights in Dickey County, ND* (not printed), served June 21, 1984. However, the burden is clearly on the proponent of an alternative methodology to provide such evidence. This protestant has not done.

Protestants also argue that costs are overstated because SBD employed two locomotive units on the branch when one would have been sufficient. UTU claims that the use

of the second locomotive, which resulted from applicant's decision to combine service on the branch with service at points to the north of Delphi, was solely for SBD's convenience, and that the expenses are not attributable to the line. There is no evidence to support a conclusion that use of the Monon Switcher to serve the line was dictated by a desire to increase costs artificially in contemplation of an abandonment application. In the absence of this evidence, we must agree with applicant that the method it chose to serve the line was a matter within its discretion.,

IMC claims that SBD has deliberately diverted carload traffic off the line and on to Chessie System trackage roughly paralleling the line, in a "blatant" effort to show loss of traffic. Since protestant provides no citation to the record, we are not sure to what it refers. If it refers to SBD's practice of handling certain grain traffic destined to points south and east of Indianapolis via Monon for interchange with B&O, that issue was resolved in the initial decision. As the ALJ pointed out, SBD has no direct interchange with any other trunk line in Indianapolis, and any interchange with such carriers in that city would have to be handled through the Indianapolis Union Belt. Moreover, the tariffs in question were governed by shortline mileage, rendering any physical circuity involved irrelevant as far as rates are concerned. There is no evidence that applicant's routing practices were adopted to discourage traffic in preparation for an abandonment. Absent such evidence, they are matters within SBD's business discretion.

Opportunity Costs. UTU in its appeal claims that the ALJ improperly added avoidable loss and opportunity costs to derive a total economic loss figure for the line. Since avoidable loss and opportunity costs were separately stated *and* separately weighed in the decision to grant the abandonment, there was no harm in combining these

figures to derive a total economic loss. Nevertheless, we have in this decision continued our practice of considering avoidable loss and opportunity costs as separate factors in the abandonment equation.

UTU also claims that real estate estimates are overstated because SBD did not estimate the cost of restoring the properties to marketable condition following abandonment. As noted in the initial decision, SBD's valuation estimates in this proceeding were purposely 30 to 40 percent below comparable sales to reflect not only the size and shape of the parcels involved, but the expenses involved in converting the right-of-way to match adjoining property.

Protestant also challenges the use of $1.33 per foot, or $7,000 per mile, removal costs citing a recent Commission decision in which such costs were found to be $10,000 per mile. However, that decision involved another carrier in an area geographically far removed from Indiana. As noted in the initial decision, applicant's figure was based upon recent SBD track removals, one of which was in Indiana.

UTU also claims that applicant's values for track suitable for relay are unsupported. It argues that because SBD is involved in many abandonments, there should be no deficiency of the higher weights of relay rail (100-115 pounds) in the foreseeable future, that this rail will most likely be retained rather than sold and that its value should therefore not be included in net liquidation value (NLV). It also argues that 90 pound relay rail should have been valued as scrap, since its use for relay purposes will depend on "inventory conditions" prevailing at the time of abandonment, and is therefore uncertain. As noted in the initial decision, the price per ton used for each grade of relay rail was the current market price obtained from railroad

contractors and brokers. Those market prices may be assumed to reflect any surplus of relay rail due to applicant's, or any other carrier's, abandonment activities. Any speculation as to whether applicant will sell immediately, or retain its rail for use on its own system or for sale at a later date, is irrelevant. Any questions regarding the classifiction of the 90 pound rail are substantially moot since applicant's revised net salvage value estimates for the Frankfort-Indianapolis segment claim only .6 ton or $81 for that grade (Appendix A, VS Rosamond, reply to appeals).

Finally, UTU argues that the 22.3 percent rate of return used by the ALJ should be revised downward to reflect applicant's effective tax rate of 25.17 percent, rather than the 46 percent statutory tax rate. The rate of return employed by the ALJ (and by applicant in its exhibits in the reopened proceeding) is the figure prescribed by the Commission as an "adequate" rate of return for such purposes in the then curent decision in *Abandonment of R. Lines — Use of Opportunity Costs,* 367 I.C.C. 734 (1983). While a carrier may elect to develop its own rate of return, it is not required to do so. *Id.* at 735.

However, in Ex Parte No. 272 (Sub-No. 3C), *Abandonment of Railroad Lines — Use of Opportunity Costs,* 1 I.C.C. 2d __, served December 18, 1984, we prescribed an adequate rate of return for abandonment purposes of 18.6 percent. Applying this rate of return to the financial evidence supplied by applicant in the reopened proceedings yields opportunity costs of $623,759, rather than $747,841.

Shipper and Community Interests. Protestants generally argue that insufficient weight was accorded the evidence of adverse impact on shippers and communities that will

assertedly result from the abandonment. They incorporate contentions previously made in their briefs. Additionally, MSA has submitted the affidavits of Truss Manufacturing Company, of Westfield, IN,[15] and Woods Wire Company, Inc., of Carmel. Both indicate that they are present users of rail service, that they anticipate increased requirements for 1984 and for the future, and that alternative transportation is either unavailable or expensive. In its reply to the appeals and its affidavit, Erbrich disputes the ALJ's finding that a spur track off the Norfolk and Western Railway Company (N&W) would adequately serve this shipper. It claims that N&W is not interested in constructing this facility because N&W cannot guarantee service beyond one year. Erbrich also claims that it has attempted to negotiate service with all motor carriers and found none that can meet its needs. Discontinuance of service will assertedly put Erbrich out of the chlorine bleach business and cause unemployment for "over a dozen minority workers" in an area of high unemployment. Finally, UTU argues that the ALJ gave insufficient consideration to a continuing need for the "Fair Train," a special passenger train operated over an 11 mile segment of the branch during the 11-day period of the 1983 Indiana State Fair. Protestant claims that contrary to the ALJ's finding that no one from the fair organization appeared to testify, the Lieutenant Governor of Indiana, a member of the executive committee of the State Fair Board, did, in fact, testifiy that the train was needed to reduce automobile congestion, that it carried 30,000 round-trip passengers in substitution for private automobiles, and that the State of Indiana and the Board look forward to permanent operation of the train.

[15]This shipper filed a letter protest to the abandonment, but submitted no testimony.

The ALJ gave proper consideration to the shipper and community interests. The additional evidence submitted by Truss, Woods Wire, and Erbrich does not require a different conclusion. Truss and Woods Wire's latest statements reveal less use of the railroad in 1984 than predicted in their earlier statements, and although these shippers argue that alternative transportation would be more expensive, neither has shown that it could not bear the cost. Assuming that Erbrich's assertions as to N&W's lack of interest and future intentions are true, loss of rail service would affect only the bleach portion of its business, which Erbirch has testified is the least profitable. Thus, even if the adverse effects projected by the shipper were to materialize, it would continue in business. We do not suggest that shippers will be unaffected by this abandonment or that we are insensitive to their situation. However, we have often stated that an unfortunate but unavoidable result of terminating uneconomical rail operations is that shippers will suffer financial difficulties. When a carrier must bear a greater burden, these difficulties do not warrant continuation of rail service. *See e.g., Illinois Term. R. Co. Abandonment,* 312 I.C.C. 607, 613 (1961). The line under consideration has shown consistent substantial losses from 1982 to the present. We conclude that the effects of continued operation of this unprofitable segment outweigh the potential harm to the affected shippers and the community.

As to the "Fair Train" issue, no regularly scheduled passenger service has been conducted over the line during the last 25 years. The "Fair Train," at best a break even proposition, was an "experiment," and there is no suggestion that the operation could be expanded into a permanent year-round operation, such as a commuter service.

Even if the service had been shown to be profitable to applicant, as well as convenient to fair goers, we are not required to deny a request to abandon a clearly burdensome line solely to preseve a break-even, limited, specialized, seasonal operation.

Labor Protective Conditions. UTU continues to claim that lifetime labor protection is required for the employees affected by this abandonment. However, as the ALJ noted, there is no evidence to support conditions different from those in *Oregon Short Line R. Co. – Abandonment – Goshen,* 360 I.C.C. 91 (1979), and we will not do so.

Environmental Consideration

The findings of the ALJ concerning the environmental and energy impacts of the abandonment, as initially proposed, apply to the amended application and are not challenged by protestants. Additionally, we will adopt the ALJ's finding that a public use condition be imposed, since the property found suitable for public use is embraced in the amended application.

We find:

1. Abandonment of the line will not result in a serious adverse impact on the rural and community development of Boone, Carroll, Clinton, Hamilton, and Marion Counties, IN.

2. The property is suitable for other public purposes.

3. This action will not significantly affect either the quality of the human environment or energy conservation.

It is certified:

The present and future public convenience and necessity permit abandonment by Seaboard System Railroad, Inc.

of its line between milepost B-137.50 at Frankfort, IN and milepost B-180.45 at Indianapolis, IN, subject to the provisions for the protection of employees set forth in *Oregon Short Line R. Co. Abandonment — Goshen,* 360 I.C.C. 91 (1979), and subject to the condition that applicant keep intact all right-of-way, including bridges and culverts for a period of 120 days from the effective date of the decision to enable any State or local governmental agency or other interested person to negotiate its acquisition for public use.

It is ordered:

1. The motions to strike and requests for further hearing of applicant, MSA, and Wickes, Erbrich, and UTU are denied.

2. The application is dismissed insofar as authority is sought to abandon applicant's line between milepost B-112.00 at Delphi, IN and milepost B-137.50 at Frankfort, IN.

3. The findings in this decision are being published in the Federal Register concurrently with service of this decision. Offers by any person or government entity for financial assistance to allow service to continue must be tendered to the carrier within 10 days following publication of this notice. The offer must also be filed concurrently with the Commission, and comply with the requirements of 49 C.F.R. 1152.27 and 49 U.S.C. 10905.

4. All correspondence to the Commission containing offers of financial assistance for subsidy or acquisition of the line must contain an appropriate reference to this proceeding. The following notation must be typed in boldface in the lower left-hand corner of envelopes containing such correspondence: Rail Section, AB-OFA.

5. SBD shall not effect abandonment or discontinuance prior to the effective date of the certificate of abandonment.

6. This certificate and decision will be effective 30 days from the service date.

By the Commission, Chairman Taylor, Vice Chairman Gradison, Commissioners Andre, Sterrett, Simmons, Lamboley and Strenio. Commissioners Simmons and Lamboley would have reopened this proceeding. Commissioner Andre dissented.

James H. Bayne
Secretary

(SEAL)

APPENDIX G

SERVICE
DATE
5-8-85

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-55 (Sub-No. 94)

SEABOARD SYSTEM RAILROAD, INC. – ABANDONMENT – IN BOONE, CARROLL, CLINTON, HAMILTON AND MARION COUNTIES, IN

Decided: May 3,1985

On April 24, 1985, Jack O. Black, the Indiana Legislative Director for United Transportation Union (UTU), filed a petition for a stay pending judicial review of the effectiveness of the certificate and decision served April 4, 1985, authorizing abandonment by Seaboard System Railroad, INc. (SBD), of its 42.95-mile line of railroad between milepost B-137.50 at Frankfort, IN and milepost B-180.45 at Indianapolis, IN, in Boone, Clinton, Hamilton, and Marion Counties, IN. Monon Shippers Association, Inc. (MSA), filed a stay petition on April 25, 1985, one day after the due date. Since MSA's arguments on the merits are similar to those of UTU, MSA's petition will be accepted and considered.

Petitioners have not demonstrated entitlement to a stay by reference to each of the four factors identified in *Washington Metropolitan Area Transit Comm.* v. *Holy Tours, Inc.*, 559 F.2d 1841 (D.C. Cir. 1977):[1]

[1] In *Washington Metropolitan Area Comm.* v. *Holiday Tours, Inc.*, the District of Columbia circuit held that in a case in which the other three factors strongly favor interim relief, a stay may be granted if the movant has made a substantial case on the merits.

(1) that there is a strong likelihood that the movant will prevail on the merits;

(2) that the movant will suffer irreparable harm in the abence of a stay;

(3) that other interested parties will not be substantially harmed; and

(4) that the public interest supports the granting of the stay.

Indeed, petitioners have not demonstrated entitlement under any of the above demanding criteria. Analysis of the second factor alone disposes of these stay petitions and, therefore, we first address whether petitioners have demonstrated that in the absence of a stay they will suffer irreparable harm.

Although the concept of irreparable harm does not lend itself to definition, there are several indisputable principles which guide us in our determination of whether this requirement has been met. First, the injury must be both certain and great. It can not be theoretical but must be actual. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time." *Connecticut* v. *Massachusetts,* 282 U.S. 660, 674 (1930); the movant must show that "[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm" *Ashland Oil, Inc. v. FTC,* 409 F. Supp. 297, 307 (D.D.C.), *aff'd,* 548 F.2d 1977 (D.C. Cir. 1976) (Citations omitted).

It is also well settled that economic loss does not in itself constitute irreparable harm. Injuries in terms of money, time and energy necessarily expended in the absence of a stay are not enough; and the possibility that adequate

compensatory or other corrective relief will be available at a later date weighs heavily against a claim of irreparable harm. See *Virginia Petroleum Jobbers Association* v. *FPC,* 259 F.2d 921, 925 (D.C. Cir. 1985). Moreover, recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business. See *Washington Metropolitan Area Transit Comm.* v. *Holiday Tours, Inc., infra* at 843 n.2.

Despite these well settled principles, petitioners premise their stay petitions upon unsubstantiated and speculative allegations of injury. UTU, for example, in the abandonment proceeding claimed that *lifetime* labor protection is required for the employees affected by the abandonment but failed to submit evidence to support conditions different from the stautory required protection as those in *Oregon Short Line R. Co. – Abandonment – Goshen,* 360 I.C.C. 91 (1979), which we imposed. Thus, UTU members are already adequately compensated. Further compensation as per a court order is clearly speculative, and only underscores the fact that corrective relief at a later date is available to UTU members.

MSA's allegations of irreparable harm are similarly speculative and hypothetical in nature. MSA argues that rail service is imperative to the survival of such businesses as Ebrick Products, Truss Manufacturing, and Woods Wire as well as to the industrial growth and job employment in the affected communities. The Commission acknowledged that shippers might be affected by the abandonment, and that it is sensitive to their situation. However, MSA has not shown that these shippers would be unable to bear any increased costs for alternative transportation, let alone that they would go out of business. MSA's allegations regarding the abandonment's impact on

industrial growth and employment are similarly speculative. In face of the common knowledge that employment and industrial growth depend on innumerable variables outside the availability of rail service, this allegation essentially asks us to act on conjecture. This we will not do.

Petitioners, therefore, have not demonstrated that they will suffer irreparable injury in the absence of a stay.

As to harm to other parties, the record clearly shows that the rail line in issue has shown substantial losses since 1982 to the present. In view of the burden on SBD of continued operation and the lack of irreparable harm to petitioners, there is even more reason to deny the stay request.

Petitioners have also failed to show that the public interest favors a stay. As discussed below, SBD has demonstrated that it is in the public interest to grant the abandonment.

Petitioners have not made a strong showing that they are likely to prevail on the merits on judicial review. Indeed, petitioners have not clearly contended that they are likely to prevail on the merits. Instead, petitioners first argue that abandonments are irreversible in nature and suggest that a stay is, therefore, appropriate to preserve effective judicial review. Notwithstanding petitioners' assertions, abandonment is not irreversible. Service can be restored even when rail has been removed. SBD assumes a great risk if it removes trackage before the completion of judicial reivew, because there is no doubt that if a court concludes the Commission erroneously authorized SBD to abandon the service in question, the court could remand the case to the Commission. The Commission, in turn, could order reinstitution of service. The carrier would then have to replace the trackage.

Next, petitioners argue that a stay is appropriate because of an alleged Commission "policy" not to oppose a stay pending judicial review. The fact that the Commission has previously stayed abandonment decisions is irrelevant. A Commission decision to impose a stay is based on the fact and potential injury in each case.

Finally, petitioners contend that there are serious legal questions presented which justify a stay of the abandonment. Suffice it to say that a presentation of legal questions alone is not sufficient to justify a stay; indeed, as petitioners note, there must also concurrently be (1) little if any harm from a stay to befall other interested parties or the public and (2) irreparable injury to the movant if the stay is denied i.e., the balance of hardships must tip sharply in favor of the movant. As stated previously, the balance of hardships do not tip sharply in favor of petitioners, but to SBD.

Moreover, petitioners do not present any serious legal questions. First, contrary to petitioners' arguments, the Commission did not improperly shift the burden of proof in this proceeding. The burden is clearly on any party seeking reopening of a Commission proceeding and was properly placed on petitioners as the proponents of such relief. On reopening, however, SBD continued to have the burden of proving that its application, amended or otherwise, satisfied the applicable statutory criteria for permitting an abandonment. The Commission did not shift this burden to the petitioners. Further, as explained below, the record establishes that SBD met its burden of proving that the abandonment should be granted.

Petitioners' argument that SBD entered into an agreement to suppress evidence in opposition to its abandonment proposal is equally baseless. Exhibits H-3 and H-4

relied on by petitioners merely constitute evidence to continue serivce.

Petitioners' claim that the Commission has denied them due process is equally without merit. They argue once again that a further hearing should have been granted to allow them to examine the paper work underlying a financial exhibit contained in SBD's rebuttal. Underlying work papers are not required to be submitted in an abandonment proceeding and petitioners had ample opportunity to obtain them through discovery. Petitioners' claimed injury is due solely to their own conduct of not seeking discovery.

Finally, SBD met its burden of proving that the abandonment in issue should be granted. SBD submitted reliable updated evidence showing that it incurred substantial avoidable losses on the line of $229,604 for October 1982 through September 1983 and $147,469 for September 1983 through August 1984. SBD also submitted reliable updated evidence showing oppoortunity costs of $623,759. The Commission balanced the impact on shippers and communities along the line against the burden to SBD to continue operations over the line, and the record supports the conclusion that the line be abandoned. The record also supports the Commission's imposition of traditional labor protection.

In view of the above discussion, it would not be in the public interest to grant a stay.

This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The petitions for stay are denied.

2. This decision shall be effective on the date served.

By the Commission, Chairman Taylor, Vice Chairman Gradison, Commissioners Sterrett, Andre, Simmons, Lamboley, and Strenio. Commissioners Andre, Simmons, and Lamboley would have granted the stay request.

James H. Bayne
Secretary

(SEAL)

Office-Supreme Court, U.S.
FILED
JUL 30 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-2025

IN THE

Supreme Court of the United States

October Term, 1984

MONON SHIPPERS ASSOCIATION, INC., ET AL.,
Petitioners,

v.

Interstate Commerce Commission and
United States of America,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SEABOARD SYSTEM RAILROAD, INC.

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Seaboard System Railroad, Inc.

July 26, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the Court of Appeals properly apply the appropriate standards in reaching its decision to deny injunctive relief prohibiting cessation of operations on a line of railroad?

RULE 28.1 STATEMENT

Respondent Seaboard System Railroad, Inc. is a wholly owned subsidiary of CSX Corporation. Listed below are companies related to the Respondent and its parent:

Allegheny & Western Railway Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Eastern Hardwood, Incorporated
Fruit Growers Express Company
Home Avenue Railroad Company
Littleton Fuel Company
Mid Allegheny Corporation
Monon Coal Company, Inc.
Nashville & Decatur Railroad Company
New Gauley Coal Corporation
North Charleston Terminal Company
Richmond, Fredericksburg & Potomac Railroad Company
Richmond-Washington Company
The Baltimore and Ohio Railroad Company
The Baltimore and Philadelphia RR Co.
The Cleveland Terminal & Valley RR Company

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SEABOARD SYSTEM RAILROAD, INC.

Respondent Seaboard System Railroad, Inc. ("Seaboard"), Intervenor-Respondent below, respectfully requests that this Court deny the petition for a writ of certiorari in this case seeking review of four orders of the United States Court of Appeals for the Seventh Circuit.

COUNTER-STATEMENT

ICC Proceedings

This case concerns an ICC decision approving Seaboard's amended application seeking authority to abandon its 43-mile long line of railroad between Frankfort, Indiana and Indianapolis, Indiana.[1]

This abandonment authority became effective thirty days from the April 4, 1985 service date of the Commission's decision in Docket No. AB-55 (Sub-No. 94), *Seaboard System Railroad, Inc. - Abandonment - In Boone, Carroll, Clinton, Hamilton and Marion Counties, IN.* [Pet. App'x. 19a-39a]. On May 15, 1985, Seaboard exercised the abandonment authority to the extent of ceasing rail operations between Frankfort and Indianapolis but left the rail line in place.

Seaboard had initially requested abandonment authority for the longer 68.5-mile line from Delphi through Frankfort to Indianapolis, Indiana. Hearings concerning the proposed abandonment were held in Indianapolis, and on July 10, 1984, the Adminstrative Law Judge ("ALJ") issued his initial decision approving the 68.5-mile long abandonment. Three days later, Seaboard amended its abandonment application by withdrawing the 25.5-mile long segment between Delphi and Frankfort, Indiana. Seaboard withdrew the 25.5-mile long segment in response to a commitment by A. E. Staley Company to ship significantly increased volumes of traffic to and from its Frankfort facility. [Pet. App'x. 13a, 19a].

Certain Protestants in the ICC proceeding filed administrative appeals with respect to the ALJ's initial decision of July 10, 1984, relying in part on changed

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[1]The Commission's decision was by a four to three majority. Of the three minority votes, two Commissioners would have granted Protestants' request for a second reopening of the proceeding. The third dissenting Commissioner dissented on the merits but did not enter a dissenting opinion. [Pet. App'x. 39a]

circumstances occasioned by Seaboard's withdrawal of a portion of the abandonment. In its reply to those appeals, Seaboard submitted revised data relating specifically to the lesser included 43-mile line segment it still wished to abandon. [Pet. App'x. 14a-15a].

After considering Seaboard's withdrawal of a portion of the abandonment, Protestants' administrative appeals, and Seaboard's reply, the Commission, by decision served September 20, 1984, accepted Seaboard's revised data on the lesser included line segment and reopened the proceeding to consider that evidence and to receive further evidence from all parties through verified statements. Protestants were given until November 13, 1984, to file verified statements in reply to Seaboard's revised evidence on the Frankfort-Indianapolis line, and Seaboard was given until December 3, 1984, to file its verified statements in rebuttal.[2] [Pet. App'x. 13a-18a].

Within two weeks of their November 13, 1984, filing date in the reopened proceeding, Protestants served Seaboard with an extensive informal discovery request seeking workpapers and various information relating to workpapers. Seaboard responded to Protestants' discovery request immediately so that Protestants were able to utilize the discovered information in their replies and still make their deadline for filing. In its rebuttal statements, Seaboard submitted certain further revised data in response to points raised in the Protestants' reply statements. Protestants did not seek to discover the workpapers relating to those revisions but rather requested a further reopening to review the workpapers and/or conduct further cross examination. Seaboard opposed further reopening because it would cause further delay but

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[2]For some reason, the reproduction of the Commission's decision on page 18a of Petitioners' Appendix shows December 3, 1984, as the due date for both the Protestants' verified reply statements and Seaboard's verified statements in rebuttal. Seaboard's copy of the same order shows the specified filing dates as November 13, 1984 for Protestants and December 3, 1984, for Seaboard.

advised the Commission that it would submit the workpapers to Protestants if the Commission deemed such action desirable.

In the Commission's decision served April 4, 1985, authorizing the Frankfort-Indianapolis abandonment, the Commission denied Protestants' request for further hearing to examine the workpapers underlying Seaboard's rebuttal statement noting that railroads are not required to submit workpapers in abandonment proceedings and that such workpapers could have been obtained through a contemporaneous discovery request. [Pet. App'x. 21a].

As to the reopening occasioned by Protestants' administrative appeal of the ALJ's initial decision, the Commission placed the burden upon Protestants to come forward with evidence to show that the alleged changed circumstances - i.e., Seaboard's withdrawal of a 25.5 mile segment of the abandonment - called for a result different from the one reached by the ALJ. [Pet. App'x. 23a]. After considering the matter, the Commission concluded that reopening was appropriate and proceeded to consider the evidence submitted by both sides subsequent to the hearings. [Pet. App'x. 24a].

In its decision granting the Frankfort-Indianapolis abandonment, the Commission thoroughly considered Protestants' various objections to Seaboard's financial evidence. [Pet. App'x. 27a-34a]. The Commission concluded that:

> . . . [E]ven after adjustments most favorable to protestants, the financial exhibits show that the [Frankfort-Indianapolis] segment is losing money. [Pet. App'x. 29a].

Court Proceedings

1. Petitioners filed their petitions for review in the Court of Appeals on and after April 24, 1985. Seaboard intervened

in the court proceeding below as a matter of right by virtue of its participation in the involved ICC proceeding. Petitioners requested that the ICC stay its abandonment certificate pending judicial review and subsequently, on Friday afternoon, May 3, 1985, filed with the Court of Appeals their emergency application for stay and motion for interlocutory injunction. Said emergency application and motion bore the following notation on its cover sheet:

> Action is necessary on or before Friday, May 3, 1985, as the line abandonment certificate otherwise becomes effective at 12:01 A.M. Saturday, May 4, 1985.

Anticipating such a "last minute" filing by Petitioners, Seaboard, on May 3, 1985, filed with the Court of Appeals its "Reply to Anticipated Motions for Stay" and "Supplement to Reply to Anticipated Motions for Stay." On the evening of May 3, the Court of Appeals issued an order denying a stay. In its decision, the Court observed that:

> The moving papers here do not persuade us that the ICC is wrong, or even likely to be wrong. [Pet. App'x. 3a].

The Court also gave Petitioners the opportunity subsequently to seek injunctive relief if Seaboard decided physically to remove the involved railroad line, observed that the Petitioners had not cast serious doubt on the ICC's conclusion that the line was unprofitable, and noted that this Court had found that Congress wished to help relieve railroads from the burden of deficit producing services in a timely fashion. [Pet. App'x. 1a-4a].

2. On May 14, 1985, and on May 17, 1985, the Court of Appeals entered orders denying two supplemental motions for injunctive relief. [Pet. App'x. 5a-8a]

3. On June 3, 1985, the Court of Appeals denied the Petitioners' request for rehearing and suggestion for rehearing en banc. [Pet. App'x. 9a-12a]

Although railroad operations over Seaboard's Frankfort-Indianapolis line ceased effective May 15, 1985, the track is still in place so rail service could be resumed if the Court of Appeals ultimately reversed the ICC.

REASONS WHY THE WRIT SHOULD BE DENIED

I. There are no exceptional circumstances in this case which call for this Court's consideration of an interlocutory decision by a lower court.

Decisions on whether to grant injunctive relief are uniquely within the province and discretion of lower courts, and this Court has consistently refrained from overturning such interlocutory decisions absent exceptional circumstances. *Holtzman v. Schlesinger,* 414 U.S. 1304, 1308 (1973) (Marshall in Chambers), *Aberdeen & R. RR v SCRAP,* 409 U.S. 1207, 1218 (1972) (Burger in Chambers). As will be evident from the following two sections of this brief, there are clearly no exceptional circumstances in this case which call for this Court's consideration of the Court of Appeals' interloctory decision.

The Petitioners certainly cannot claim that they were not given ample opportunity to present their case to the Court of Appeals or that the Court denied their various petitions and motions in summary fashion. In response to Petitioners' veritable barrage of pleadings during the month of May, 1985, the Court of Appeals issued four separate orders denying Petitioners' requests for injunctive relief. [Pet. App'x. 1a-12a]. The Court's orders of May 3, 1985 and June 3, 1985, are substantive decisions which reflect thorough and appropriate consideration of Petitioners' various arguments. In view of the

lack of any exceptional circumstances, this Court should not endeavor to reconsider issues which have already been carefully and properly considered by the Court of Appeals.

II. The Court of Appeals properly applied the appropriate standards in determining whether or not to grant injunctive relief.

The only substantive issue before the Court is whether or not the Court of Appeals properly applied the appropriate standards in reaching its decision to deny Petitioners' request for injunctive relief. As Petitioners acknowledge on page 13 of their petition for certiorari, a request for injunctive relief must meet four prerequisites if it is to be granted. There must be a showing that:

1. There is reasonable likelihood of success on the merits;
2. Irreparable injury will result in the absence of an adequate remedy at law;
3. The threatened harm to the Petitioner outweighs the harm the injunction may cause the Respondent; and
4. The granting of the injunction will not disserve the public interest. *Ciechon v. City of Chicago,* 634 F.2d 1055, 1057 (7th Cir. 1980), *accord, Washington Metropolitan Area, etc. v. Holiday Tours,* 559 F.2d 841, 843-44 (D.C. Cir. 1977).

The circumstances of this case simply do not permit a finding that the above-listed prerequisites are present. First, as to likelihood of success on the merits, the Court of Appeals stated as follows in its order issued May 3:

> The moving papers here do not persuade us that the ICC is wrong, or even likely to be wrong. [Pet. App'x. 3a].

Petitioners contend that in enunciating the above-quoted finding, the Court of Appeals imposed an improper, "wrong" test to determine whether or not the requested injunctive relief should issue. The Court of Appeals' assailed pronouncement

is, however, clearly just another way of stating that Petitioners failed to show a reasonable likelihood of success on the merits. Petitioners' argument goes only to semantics, not substance. It is plain that the Court of Appeals considered the facts and found Petitioners unlikely to succeed.

In another argument relating to the Court of Appeals' consideration of "likelihood of success on the merits," Petitioners also assert that the Court of Appeals improperly established the "profitability" of the involved rail line as the controlling standard for review on the merits. [Pet. 11-13]. Petitioners assert that the Court of Appeals' alleged adoption of a "profitability" standard resulted from its mistaken interpretation of this Court's decision in *Hayfield Northern RR v. Chicago and N.W. Transp. Co.,* 467 U.S. , 104 S. Ct. 2610, 81 L. Ed. 2d 527 (1984).

Notwithstanding Petitioners' arguments to the contrary, the Court of Appeals did not interpret this Court's decision in *Hayfield* as establishing a "profitability" standard for railroad abandonment proceedings which would supplant the long-standing balancing test prescribed in *Colorado v. United States,* 271 U.S. 153, 168 (1926). The Court of Appeals merely, and correctly, recognized that in *Hayfield,* this Court found that Congress had taken various actions to "abbreviate the period during which a carrier is obligated to furnish financially-burdensome service it seeks to escape through abandonment." *Hayfield,* 467 U.S. at____, 81 L. Ed. 2d at 538. The Court of Appeals was thus correctly guided by this Court's recognition of congressional intent to enable railroads to abandon financially burdensome services without unreasonable delay. The Court of Appeals' reliance on *Hayfield* was entirely appropriate and in no way constituted application of a new or innapropriate standard to the merits of the abandonment decision.

As to the second standard, the Court of Appeals' order of May 3, 1985 correctly and adequately considers the issue of

irreparable injury. It recognizes that any irreparable injury would result from removal of the track rather than from mere cessation of service and affords Petitioners ample opportunity to seek appropriate injunctive relief if Seaboard decides to physically remove the involved line of railroad pending judicial review. Seaboard is required to give Petitioners 14 days notice of any plan to remove the track or otherwise make the line unsuitable for rail service, and at such time, Petitioners may petition the Court of Appeals for injunctive relief prohibiting any such destruction of the track. [Pet. Appx. 3a-4a]. Thus while Seaboard ceased operations over the involved line effective May 15, 1985, the track is still in place and rail service could be resumed if the Court ultimately reversed the ICC.

On page 14 of their petition, Petitioners provide authority for the proposition that state agencies can secure injunctive relief against an unlawful—i.e., without ICC authority—abandonment. Seaboard's Frankfort-Indianapolis abandonment is clearly not unlawful, however, and even a cursory review of the cited case shows that it dealt with a totally dissimilar factual situation. In said case, the Court was considering whether or not The Baltimore and Annapolis Railroad Company ("Baltimore & Annapolis") had impermissibly abandoned a line of railroad by suspending service for an extended period pursuant to an embargo.[3]

The embargo was imposed after the line had suffered extensive damage from a hurricane. Baltimore & Annapolis wished to abandon the line anyway, and it made no effort to make the repairs necessary to restore it to operating condition. The Court found that under such circumstances, the railroad had illegally abandoned the line without ICC approval, but those circumstances are clearly dissimilar with the facts of the

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[3]An embargo is a means of suspending service on a line of railroad in response to an emergency situation, but it is understood to be only a temporary measure. *ICC v. Baltimore and Annapolis RR*, 398 F. Supp. 454, 467 (D. Md. 1975).

case at hand. *ICC v. Baltimore and Annapolis RR,* 398 F. Supp. 454, 457-63 (D. Md. 1975).

The Court of Appeals was understandably unpersuaded by Petitioners' arguments that although the track might remain intact pending judicial review, the mere cessation of operations would cause irreparable injury. Petitioner Jack Black alleged that the subject abandonment would cause irreparable injury to railway employees, but unlike most workers whose jobs are eliminated or reduced, these railroad workers are protected by the standard employee protective conditions imposed by the Commission. [Pet. App'x. 37a.]. The labor interests were not satisified with this protection - United Transportation Union argued for *lifetime* labor protection for employees affected by this abandonment - but the Commission correctly found that there were no unusual circumstances to justify protective conditions more liberal than those normally imposed. [*Id.*]

Petitioner Monon Shippers Association, Inc. ("MSA") also alleged that shippers along Seaboard's Frankfort-Indianapolis line would be irreparably injured by its abandonment, but the Commission's findings showed that any adverse impacts on shippers would be minimal. As the Administrative Law Judge stated on page 13 of his initial decision served July 10, 1984:

> The evidence in this proceeding clearly indicates that there are alternative modes of transportation available to the shippers. Indeed, the evidence demonstrates that the shippers already make extensive and, in fact, in some cases exclusive use of the abundant alternate transportation available to them.

The Commission found that "The ALJ gave proper consideration to the shipper and community interests" and further found that the evidence submitted in the reopened proceeding by two of the shippers showed less use of the railroad in 1984 than they had predicted in their earlier statements. [Pet. App'x. 36a].

The ICC did not suggest that shippers would be unaffected by the abandonment but acknowledged that an unfortunate but unavoidable result of terminating uneconomical rail operations is that shippers will experience some financial difficulties. [*Id.*] This reasoning is entirely consistent with judicial decisions upholding ICC orders granting abandonment authority. Such decisions have held that:

> If railroad abandonment had to depend upon proof that the affected community would suffer no inconvenience or economic loss, we dare say that few lines, if any, would ever be abandoned. *Nebraska v. United States*, 255 F. Supp. 718, 722 (D. Neb. 1966).

It is thus clear that (i) the Court correctly concluded that mere cessation of operations over the involved line did not constitute irreparable harm and (ii) the Court effectively forestalled any possiblity of irreparable harm by providing an opportunity for subsequent injunctive relief in the event Seaboard contemplated physical removal of the track.

The third prerequisite for injunctive relief requires consideration of the harm the injunction might cause the respondent. In that regard, the Court noted in its May 3 order that:

> The papers filed with this court do not cast serious doubt on the basic conclusion of the ICC - that the line is unprofitable. [Pet. App'x. 2a].

It is thus evident that Seaboard would have suffered significant financial harm as the result of an injunction requiring continuation of the involved deficit operation.

The fourth and final prerequisite for injunctive relief is that it be required in the public interest. The Court of Appeals properly recognized that the public interest in rail abandonments transcends the interests of the protesting shippers and employees. It followed this Court's finding in *Hayfield* that Congress wished to help relieve railroads from

the burden of deficit producing services in a timely fashion.

Notwithstanding Petitioners' bare allegation that Mr. Justice Rehnquist's decision in *Coleman v. PACCAR, Inc.* is inapplicable to judicial review of administrative action under the Hobbs Act, it is clear that the findings in that decision apply equally well in these premises. It is likewise clear that the Court of Appeals applied the well established standards for issuance of injunctive relief in a manner consistent with Mr. Justice Rehnquist's findings in *Coleman. Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1305 (1976) (Rehnquist in Chambers).

III. The question presented for review does not raise any issues of substantial significance and deals with matters inextricably related to the facts of this case.

As was discussed in the preceding section, the question presented for review is extrememly narrow. It is not whether the Staggers Act changed standards governing line abandonments or whether the proper standard governing issuance of injunctive relief with respect to railroad abandonments is whether the underlying agency decision is "wrong." Rather, the only issue before this Court is whether or not the Court below properly applied the appropriate standards governing issuance of injunctive relief. A decision answering that question would not resolve any substantially significant matters and would be inextricably bound to the facts of this case. Moreover, the discussion in the preceding section clearly shows that the Court of Appeals properly applied the appropriate standards and that it would inevitably be upheld.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 84-2025

In the Supreme Court of the United States

OCTOBER TERM, 1985

MONON SHIPPERS ASSOCIATION, INC., ET AL., PETITIONERS
v.
INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners seek review of the court of appeals' denial of an interlocutory injunction pending appeal of an Interstate Commerce Commission decision authorizing a rail line abandonment.

1. In the court below, the petitioners sought a stay of the decision of the Interstate Commerce Commission served April 4, 1985, authorizing the Seaboard System Railroad, Inc. (SBD), to abandon a 43-mile line of railroad between Frankfort and Indianapolis, Indiana. SBD sought to abandon the line pursuant to 49 U.S.C. 10903 and 49 C.F.R. Pt. 1152. Initially, SBD had sought and received Commission approval to abandon a 68.5-mile stretch of track known as the Indianapolis Branch. Subsequently, SBD informed the Commission that, based upon a commitment from a major shipper on the line to ship significantly increased volumes of traffic to and from its Frankfort facility, it would withdraw

its application with respect to the 25.5 mile segment between Delphi and Frankfort. In light of the partial withdrawal, the Commission ordered the proceeding opened for further hearing on modified procedure (Pet. App. 13a).

In that order, the Commission accepted additional evidence tendered by the railroad, consisting of revised data for operations over the entire line which it originally sought to abandon and data reflecting operations over the remaining Frankfort-Indianapolis segment which it still sought to abandon (Pet. App. 14a-15a). The Commission order also established a procedural schedule for protestants to reply to the railroad-tendered evidence (*id.* at 17a-18a).

Petitioners — Monon Shippers Association, Inc.; Jack O. Black (representing the United Transportation Union); and the Office of Utility Consumer Counselor for the State of Indiana — contended that the disclosure of SBD's intention to serve the portion of the line between Delphi and Frankfort (the northern segment) constituted a "changed circumstance" rendering obsolete all evidence previously submitted and considered in the initial decision. Petitioners also argued that no conclusion as to the Frankfort-Indianapolis portion (the southern segment) could be drawn from financial evidence for the entire line (Pet. App. 21a-22a).

In rejecting petitioners' contentions, the Commission noted that authority granted in an abandonment proceeding is permissive, and that the extent to which an abandonment is consummated is a matter solely within the carrier's discretion (Pet. App. 22a). Hence, had SBD waited until a certificate was issued in the original proceeding, it could have achieved the same result it now sought with no basis for complaint from petitioners (*ibid.*). The agency stressed that absent indications of fraud or abuse of the abandonment procedures, the timing of an applicant's disclosure of its intentions is immaterial. Having concluded that there

was no statutory or regulatory impediment to the partial withdrawal here, the Commission accepted the proposed amendment to the application (*ibid.*).

The agency also ruled that the acceptance of SBD's partial withdrawal did not require a new evidentiary presentation (Pet. App. 23a). The ICC concluded that, although SBD's decision to continue operations on the northern portion of the line was a changed circumstance, petitioners had not met their burden of demonstrating that the changed circumstance would alter the result previously reached as to the remainder of the line (*ibid.*). Inasmuch as reopening was necessary to consider Chessie System-wide data, and SBD had submitted and protestants replied to evidence on the line's southern segment, however, the Commission considered all such evidence and arguments in deciding to grant the amended application (*id.* at 24a, 27a-37a).

Subsequently, petitioners filed before the agency a petition for stay pending judicial review, which was denied by a decision served May 8, 1985 (Pet. App. 40a-46a).

2. On May 3, 1985, petitioners filed an emergency petition for stay and injunctive relief in the court of appeals. The court denied relief. It concluded that the decision of an administrative agency is presumptively lawful, citing *Coleman* v. *PACCAR, Inc.*, 424 U.S. 1301 (1976) (Rehnquist, Circuit Justice), and that "[t]he moving papers here do not persuade us that the ICC is wrong, or even likely to be wrong" (Pet. App. 3a). The court held that the petitioners failed to cast any serious doubt on the basic conclusion of the Commission that the line was unprofitable, and that, as this Court pointed out in *Hayfield N.R.R.* v. *Chicago & N.W. Transportation Co.*, No. 82-1579 (June 12, 1984), slip op. 5-7, Congress passed the Staggers Rail Act of 1980, 49 U.S.C. 10101 *et seq.*, to expedite the abandonment of unprofitable lines in order to stop the financial drain on

railroads (Pet. App. 2a-3a). The court of appeals also pointed out that petitioners did not assert that the appropriate bodies had made offers of subsidy pursuant to the Act to keep the line going, despite having "plenty of time to do so" (*id.* at 3a).

Subsequently, petitioners twice filed supplements to their motion for interlocutory injunction, vigorously attacking the court's May 3 decision and the accompanying opinion. These were treated as motions to reconsider, and were denied on the merits (Pet. App. 10a). Thereafter, on May 28, petitioners filed a petition for rehearing and suggestion for rehearing en banc. In denying this petition, the court noted that it was a successive request for rehearing, and that the court's rules do not provide for successive applications (*ibid.*). The court also pointed out that its policies do not permit the rehearing en banc of decisions on motions, and that only full decisions on the merits may be reheard en banc. It reproved petitioners for the "intemperate if not contemptuous language" in one of their filings (*id.* at 11a, note).

The court did not, however, deny petitioners' request out of hand. It took the opportunity to explain its May 3 order, pointing out that petitioners had misinterpreted its basis. The court explained that the thrust of its earlier opinion was that an administrative order is presumed valid and may be set aside pending review only if the movant makes a substantial showing that the agency is probably wrong. The court stated that in its earlier decision it did not hold that interim relief is never available in an abandonment case. Instead, the court said, its review of petitioners' applications for interlocutory relief, together with the ICC's decision, simply did not reveal convincing grounds for believing that the ICC was probably wrong (Pet. App. 11a). The scope of review is "very narrow," the court concluded, and

"the ICC's order here appears to address the essential issues" (*ibid.*)

3. This Court does not generally grant certiorari "to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent an extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, T. & K. Ry.*, 148 U.S. 372, 384 (1893). Indeed, the Court has said that lack of finality "of itself alone furnished sufficient ground for the denial" of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See also, *e.g.*, *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970) ("piecemeal appellate review is not favored, * * * and this Court above all others must limit its review of interlocutory orders") (citations omitted).

The only reason given in the petition for seeking this Court's review in the present posture of this case is the unsupported assertion that "there can be no effective judicial review if [rail] service ceases for any extended period of time" (Pet. 14). It is nowhere explained why this should be so (the Commission disputes this point at Pet. App. 43a); certainly there is no showing of potential "extraordinary inconvenience and embarrassment." Moreover, SBD represented to both the court of appeals and the ICC on May 1, 1985, that it would not object to a partial stay requiring it to leave the Frankfort-Indianapolis line in place pending judicial review,[1] so that reactivation would require only minimal maintenance costs. The court of appeals' May 3 order directs Seaboard to give movants 14 days' notice "of any plan to remove the track or otherwise make the line unsuitable for rail service in the event this court ultimately sets

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[1]A copy of SBD's filings on that date has been lodged with the Clerk of this Court. There is an apparent typographical error in the court of appeals' May 3, 1985, order that SBD opposed such a limited stay (Pet. App. 3a).

aside the ICC's order" (Pet. App. 3a-4a). Petitioners assert no such notice and, indeed, acknowledge that "[t]he Court of Appeals left open the possibility of a stay at a future date to prevent dismantling of track pending judicial review" (Pet. 8).

4. In any event, the court of appeals did not err in denying injunctive relief.

Contrary to petitioners' assertion, the court of appeals did not interpret this Court's ruling in *Hayfield* as substituting an "unprofitability" standard for rail abandonments in place of the traditional balancing test established in *Colorado* v. *United States*, 271 U.S. 153, 168 (1926). The court of appeals simply noted that, in *Hayfield*, this Court acknowledged Congress's desire to lessen the length of time that financially strapped carriers would be burdened with such unprofitable lines. The court of appeals correctly concluded that injunctive relief would undo part of what Congress sought to achieve. The court further recognized (Pet. App. 2a-3a), as did this Court's decision, that subsidization procedures were also a part of the statutory scheme — and it pointed out the failure of petitioners here to avail themselves of them. The court of appeals' observance of and reliance on *Hayfield* was correct and entirely appropriate in determining whether injunctive relief should be granted, and its reliance on *Hayfield* did not in any way constitute the establishment of a new substantive standard for the ultimate assessment of the merits of an abandonment decision.

Nor did the court of appeals fail to apply the traditional balancing test for granting an interlocutory injunction (likelihood of success, irreparable injury, effect upon other parties, and the public interest) (Pet. 13). In its May 3 decision, the court stressed that it was deferring to the ICC's decision generally in this matter (Pet. App. 3a); that decision

weighed, besides the burden on the carrier, the interests of shippers and the community (see, *e.g.*, *id.* at 36a). As the court said in its June 3 opinion, "the ICC's order here appears to address the essential issues" (*id.* at 11a). The court also specifically weighed the likelihood that petitioner would prevail on the merits and found it lacking (*id.* at 3a; see also Pet. App. 43a). The court of appeals in denying a stay should not have to recite every applicable legal principle in its opinion. See *Coleman* v. *PACCAR, Inc.*, 424 U.S. at 1305 (Rehnquist, Circuit Justice).[2]

On the record before the court of appeals, the magnitude of the harm to the carrier from requiring continued operations was amply documented in the Commission's underlying decision. The harm to petitioners and others from permitting abandonment was also considered and determined not to be sufficient to require continued operations. In view

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[2]Petitioner also asserts (Pet. 10) that the "decision of the court of appeals is in conflict with the decision of other courts of appeals since enactment of the Staggers Rail Act of 1980 * * *." While this "conflict" is never explicitly elaborated on, apparently petitioner refers to the four decisions it lists on page 12 of the petition. Two of these are, like the decision below, Seventh Circuit cases. None of these decisions (to the extent they even applied post-Staggers Act law) expressly considered how or whether the Staggers Act changed the balancing the ICC does.

In any event, they do not reflect any difference about the legal standards to be applied by courts of appeals with respect to requests for interim relief from Commission decisions.

of the congressional policy discussed by this Court in *Hayfield*, the court of appeals quite properly declined to stay implementation of the Commission's authorized abandonment.

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